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A CONCISE TREATISE

ON

POWERS.

BY

GEORGE FARWELL, B.A.,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE.

THE object of this book is to reduce the law relating to Powers of Appointment, both of real and personal estate, to a series of rules or principles, established by or derived from the decided cases. These rules are printed in large type, and the cases and dicta illustrating and confirming them are subjoined to each in ordinary type. The *ipsisima verba* of the Judges have been as nearly as possible adhered to throughout. Everyone who has occasion to consider the law affecting powers must be under great obligations to Lord St. Leonards; and frequent reference has been made in the following pages to his treatise; but, it is, perhaps, unnecessary to add, the statements and conclusions in this book have been arrived at independently. It is hoped that the lapse of time

since the publication of the last edition of that learned Lord's book, and the different object of the present treatise, will be a sufficient excuse for its appearance.

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ERRATA ET ADDENDA.

- Page 7.—Refer to Hawkins on Wills at p. 140, not 143; and after *Edie v. Babington*, add *Drake v. Attorney-General*, 10 Cl. & Fin. 257.
- „ 14.—After *Horner v. Swan*, add *Davies v. Huguenin*, 1 H. & M. 730; *Smith v. Houbton*, 26 B. 482.
- „ 65.—Add reference to *Priece v. North*, 1 Ph. 85.
- „ 93.—*Dele* the reference to Powers of Attorney.
- „ 96.—Add reference, as to restraint on anticipation, to *Re Ellis*, 17 Eq. 409.
- „ 98.—*Dele* the reference to Powers of Attorney, and add reference to Bacon, Abridg. Tit. Auth. B. & Co. Litt. 128. a.
- „ 102.—After Lewin, 330, add reference to *Turner v. Turner*, 30 B. 414.
- „ 117.—Add reference to *Daune v. Annas*, Dyer, 219.
- „ 119.—See *post*, 431.
- „ 121.—After *Uvedale v. Uvedale*, add reference to *Anon.*, 2 Leon. 220.
- „ 144.—Add reference to 24 & 25 Vict. c. 114.
- „ 145.—After *Brodrick v. Brown*, add *Bailey v. Hughes*, 19 B. 169.
- „ 148.—After *Re David*, add “and payment out has been directed without the execution of a formal deed of appointment,” *Cambridge v. Rouse*, 25 B. 574.
- „ 212.—After Sug. Pow. 359, add reference to *Spoor v. Green*, L. R. 9 Ex. 99, and *Child v. Douglas*, 2 Jur. N. S. 950.
- „ 305.—Lord Selborne’s Act is now law—37 & 38 Vict. c. 37.
- „ 372.—After rule, add reference to *Jones v. Lord Suffolk*, 1 Bro. C. C. 528.
- „ 386.—After *Vanderzee v. Aclom*, add “It is clear that a valid appointment divests previously vested interests,” *Jones v. Wenwood*, 10 Sim. 150; *Re Vizard*, 1 Ch. 588; *De Serre v. Clarke*, W. N. 1874, p. 175.
- „ 391.—After rule, add reference to *Re Hargrove*, Ir. R. 8 Eq. 256.
- „ 393.—After *Green v. Marsden*, add reference to *Le Marchant v. Le Marchant*, W. N. 1874, 166.
- „ 419.—As to the word “family,” in a devise of real estate, see *Burt v. Hillyar*, 14 Eq. 160.

A CONCISE TREATISE ON POWERS.

CHAPTER I.

POWERS.

1. <i>Division of Powers ; Common Law Powers ; Equitable Powers ; Powers operating under the Statute of Uses</i>	1	3. <i>Effect of limitation unto and to the use of A.</i>	5
2. <i>In what deeds Powers may be inserted. Deeds operating by transmutation of possession ; and otherwise</i>	3	4. <i>Devise to uses</i>	6
		5. <i>Division of Powers into general and limited</i>	7
		6. <i>Division of Powers under statute : collateral ; relating to the land ; appendant, or in gross</i>	8

1. POWERS are either Common Law Powers, Equitable Powers, or derive their efficacy from the Statute of Uses. Common Law Powers are in effect authorities given to one person by another to do an act for him : they may be bare authorities, or powers coupled with an interest.

A Common Law Power, as its name implies, enables the donee to pass the legal estate ; but it is the execution, not the creation of the power, which effects the transmutation of estate. The legal estate before the execution remains in the creator of the power, or the heir-at-law, as the case may be. Thus, a devise by A. that his executors do sell his lands, gives the executors a power to pass the legal estate to the purchaser ; the executors themselves take no estate—that descends to the heir-at-law until the power is executed—but they have the power of nominating the purchaser as the person to take the

Division of powers.

Common law powers.

What
estates can
be created
there-
under.

legal estate, and on their doing so, the estate at once vests in him in the same way as if the testator had named him as his devisee (*E. of Stafford v. Buckley*, 2 Ves. sen. 178; *Warneford v. Thompson*, 3 Ves. 513; *Smith v. Lord Camelford*, 2 Ves. 698). Powers of attorney and powers created by Act of Parliament are also instances of Common Law Powers (Sug. Pow. 45). It must of course be borne in mind that, by the common law, estates can only be limited in possession, or by way of remainder or reversion, to take effect on the natural determination of the preceding estate. The grantor, in a common law conveyance, cannot reserve to himself, nor confer on any other person, the power of revoking or altering the grant, by any future act or instrument, for that is deemed repugnant to the conveyance itself (*Co. Litt.* 237 *a*).

Equitable
powers.

Equitable Powers are such as are enforceable only in equity—*i.e.*, where the legal interest is properly vested in one or more, but a power of disposing of the beneficial interest is in some other person. The legal interest does not pass by the execution of the power, but the legal owner must transfer it in order to complete the title of the nominee of the person who executes the power, and equity will compel such transfer. The power of selling real estate vested by implication in executors, by a charge of debts (before 22 & 23 Vict. c. 35), is an instance of an equitable power (Creation of Powers, s. 11). So, too, is the ordinary power of appointment among children in a marriage settlement where personalty is vested in trustees. Powers operating under the Statute of Uses are powers of revoking existing or declaring future uses, vested in some person named for that purpose, in the deed by which the uses to be affected by the operation of the power are created. It has been already observed that before the statute estates could

Powers
operating
under the
Statute of
Uses.

only be limited in possession, or by way of remainder or reversion to take effect on the natural determination of the preceding estate of freehold. Shifting and springing estates were repugnant to the simplicity of the common law, but even before the statute were enforceable in equity; the estate of *cestui que use* being equivalent to the estate now enjoyed by *cestui que trust*. The statute enacted in effect that the seisin should follow the use; that is, that the legal estate should, by force of the mere declaration of the use, pass to the *cestui que use*. This was restrained to the first use by the decision of the common law judges, that there can be no use upon an use. Therefore, in a conveyance to A. to the use of B. to the use of C., the statute executes the use in B., and C.'s estate is merely equitable. One effect of the statute has been to enable the creation of shifting, future and springing uses, limited to take effect on the occurrence of certain events or the nomination of certain persons. The ordinary limitation in a marriage settlement to the use of the settlor until the marriage, and from and after the solemnization thereof to the use of trustees, is an instance of a shifting use to arise on the occurrence of an event; and the powers of sale, jointuring, and the like, usually inserted in such settlements, are instances of future uses to arise on the nomination of a person. A power operating under the statute is, then, the capacity thus given to call legal estates into existence in the future (see Sug. Pow. ch. 1).

2. The last-mentioned powers cannot be inserted in deeds of all kinds.

In what
deeds
powers
under the
statute
may be
inserted.
Deeds
operating
by trans-
mutation of

Conveyances of real estate under the statute may, or may not, operate by transmutation of possession. Where land is conveyed by a common law assurance to A. in fee, the legal seisin is transferred, and vests in him by the conveyance by the common law; and if the grantor

possession
and deeds
not so
operating.

In what
deeds
inserted.

Want of
considera-
tion a
further
objection
to the in-
sertion of
powers in
bargains
and sales
and cove-
nants to
stand
seised.

declares that such conveyance shall enure to certain uses, those uses will immediately arise, and be executed out of the seisin of A., and the statute transfers the legal estate to those *cestuis que use*. But if the deed be not such as to operate by transmutation of possession; that is, if it derive its effect from the Statute of Uses and merely transfer the use, there can be no further valid use than that of the first *cestui que use*. Thus, if A. bargain and sell by deed enrolled under the statute, to B. and his heirs, there is no conveyance at common law; but, by the operation of the statute, the legal estate at once vests in B.; that being done, the statute is powerless to raise any further uses, for an use cannot be raised upon an use. It follows, therefore, that powers deriving their effect from the Statute of Uses can only be inserted in deeds operating by transmutation of possession; that is, in declarations of uses of fines and recoveries, feoffments to uses, releases and grants, and not in a bargain and sale, or covenant to stand seised. And further, it is laid down in *Mildmay's case* (1 Co. Rep. 176), that although a power of leasing may be reserved in a declaration of uses of a fine or recovery, yet that no such power can be reserved in a bargain and sale or covenant to stand seised; for as uses may be raised on a fine or recovery, without any consideration, therefore an use will arise to the lessees without consideration, and the former estates being raised without consideration, may be defeated without consideration. But as no uses can arise on a bargain and sale, or covenant to stand seised, without consideration, therefore no use can arise to the lessees; for where the persons are altogether uncertain, and the terms unknown, there can be no consideration; so that the former estates which were raised upon consideration, cannot be defeated by such leases (see Sug. Pow. 138).

3. In connection with the doctrine that an use cannot be limited upon an use, the effect of a limitation unto and to the use of A. may be considered.

Limitation
unto and
to the use
of A.

The statute says that "where any person or persons stand or be seised, &c., to the use, confidence, or trust of any *other* person or persons," &c. Therefore, if an use be limited to a feoffee, conusee, recoveror, or releasee, such use, generally speaking, is not executed by the statute, but the feoffee, &c., is in by the common law (*Meredith v. Jones*, Cro. Car. 244). In this case, notwithstanding the grantee is in by the common law, yet after the declaration of the use to him, he has not only a seisin but an use, although not the use which the statute requires; and, therefore, that seisin which, before the limitation of the use to himself, was open to serve uses declared to a third person, is by the limitation filled up, and will not admit of any other use being limited on it, upon the principle that an use cannot be limited upon an use (*Sanders on Uses*, 5th ed. 89). "He is in of the estate clothed with the use, which is not extinguished but remains in him; he is, in fact, in both of the estate and the use, both by the common law and by the statute" (*D. v. Passingham*, 6 B. & C. 305).

Accordingly, in that case, the estates which followed a conveyance unto and to the use of A., were held to be equitable. But that was to effectuate the intention; and it is to be observed that he is primarily in by the common law, although the statute operates so far that no further uses can be declared. That he is in by the statute appears on several authorities. Thus, a conveyance to A. to the use of B. and his heirs gives B. an estate during A.'s life only (for *cestui que use* cannot have an estate in the use of greater extent than the seisin out of which it is raised); but a conveyance to A. to the use of A. and his heirs gives A. the fee (*Meredith v. Jones*,

Cro. Car. 244). And Lord Bacon (Uses, 65) says, "The whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore the statute ought to be expounded that where the party seised to the use and the *cestui que use* is one person, he never taketh by the statute, except there be a direct impossibility or imperitineny for the use to take effect by the common law."

In *Orme's case* (L. R. 8 C. P. 281), A. seised in fee granted "unto B., C., and D., and their heirs, one perpetual yearly rent-charge of £9," "to hold the said rent-charge unto the said B., C., and D., their heirs and assigns, to the use of the said B., C., and D., their heirs and assigns for ever, as tenants in common, and in equal shares."

It was held that the use being specific, and not inconsistent with the rest of the habendum, the whole habendum must be read as specific, and so read that the deed operated as a grant at common law, and not under the Statute of Uses. In *Heelis v. Blain*, 18 C. B. (N. S.), 90, and 34 L. J. C. P. 88, the grant was to B. and his heirs, habendum to B. and his heirs to the use of A., B., C., D., E., and F., their heirs and assigns, as tenants in common. That was held to operate under the statute. (And see Sug. Pow. 141-2.)

Devise to
uses.

4. It seems to be now settled that a devise to uses operates by virtue of the Statutes of Wills, concurrently with the Statute of Uses: and accordingly a devise to A. and his heirs to the use of B. and his heirs, vests the legal estate in B.; and on the other hand, a devise to the use of A., and his heirs in trust for B., vests the legal estate in A. And (notwithstanding the doubts that have been suggested) it seems clear that a devise to uses is good without a seisin to serve those uses. (Sug. Pow. 146-8; 2 Jarm. on Wills, 2nd ed. 239.)

The question whether trustees do or do not take the legal estate in particular cases under limitations in wills, depends on the quantum of estate necessary to enable them to perform the trusts confided to them (Vaughan Hawkins on Wills, 143). The question whether a devise operates under the statute or is a mere common law power is important in considering the estates created by the execution of the power. For example, a conveyance by the donees of a common law power unto A. and his heirs to the use of B. and his heirs, would give B. the legal fee; while the same words of conveyance, if used by devisees to uses, would vest the legal fee in A. It may be added that it seems clear that although no seisin has been raised by a devise (*e.g.*, if A. devise that B. sell his lands), yet B., in exercising his power, may create a seisin to serve uses, for such must have been the intention of the testator (Sug. Pow. 198).

Difference in estates created by common law powers and by powers under the statute.

5. Powers may be either general or limited. General powers are those where no limits are placed on the donee's choice of objects. Limited, or special powers, are those the objects of which are specified persons or classes. And a power to appoint to whom the donee pleases except A. is a general power. (*Edie v. Babington*, 3 N. Ch. R. 568.) And the postponement of the period of distribution of a fund over which a power of appointment to whom the donee pleases is given, does not prevent the power from being general (*Re Keown*, 1 R. 1 Eq. 372).

General and limited powers.

A husband or wife, donee of a general power, or of a limited power of which the other is an object, may appoint to that other; but if the appointment be by the wife in her husband's favour, the court will look with some jealousy on it. But such an appointment will be considered good, unless it is shown to have been made under circumstances sufficient to invalidate it; and the *onus probandi* is on the person impeaching the appoint-

Appointment by wife to husband.

ment (*Nedby v. Nedby*, 5 De G. & Sm. 377). It has been held, however, that a married woman cannot, under a power of leasing, demise to her husband. *D. d. Hart-ridge v. Gilbert* (5 Q. B. 828).

Division
of powers
under
statute.

Collateral.

Coupled
with trust.

6. Powers operating under the statute are either collateral or relating to the land: a power collateral is a bare power given to a mere stranger who has no interest in the land; *e.g.*, a power of sale and exchange in a settlement given to trustees who have no estate in the settled lands. "A power collateral is of the nature of an authority to deal with an estate, no interest in which is vested in the donee of the power. A power of that nature is wholly different from an estate or interest, and cannot without abuse of language be so designated. It may be conceded that such a power may, in one sense, be the subject of a trust—that is, it may be coupled with an obligation as to its exercise; and there may be a person entitled to insist on the performance of the obligation; and therefore, by a metaphorical and incorrect use of language, such a power may be called the subject of a trust, the donee may be described as a trustee, and the person calling for the exercise of the power may be termed a *cestui que trust*. But if this be conceded, the subject-matter of the trust still remains in its integrity as a simple power or authority to be distinguished from an estate or interest." (*Per Lord Westbury, Dickenson v. Teesdale*, 1 D. J. S. 60.)

Relating
to the
land.

A power relating to the land is a power given to some person having an estate or interest in the land over which it is to be exercised.

A power relating to the land is either appendant or in gross.

Appen-
dant.

It is appendant when the estate created by its exercise overreaches and affects the estate and interest of the donee of the power.

It is in gross when the estate so created is beyond, *In gross.* and does not affect the estate or interest of such donee, but notwithstanding is annexed in privity to it, and takes effect in the appointee out of an interest vested in the appointor; thus, a power of jointuring given to a tenant for life is in gross. A power of leasing in possession in the same person is appendant. (See Butler's note to Co. Litt. 342 b.)

The distinction is important with respect to their extinguishment and suspension.

CHAPTER II.

EXTINGUISHMENT AND SUSPENSION OF POWERS.

1. Collateral powers cannot be extinguished or released	10	6. Powers in gross: whether destroyed or not by the termination of any estate which the donee thereof may have	19
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Collateral powers cannot be extinguished or released.

1. A POWER simply collateral cannot be extinguished or suspended by any act of the donee, or of any other persons, with respect to the land: nor can it be released, where it is to be exercised for the benefit of another (*West v. Berney*, 1 R. & M. 434; *Willis v. Shorral*, 1 Atk. 474; *Digge's case*, Sug. Pow. 893).

And *à fortiori*, a power coupled with a duty cannot be released, nor, if it be to arise at some future time, can the donee fetter his right to exercise it by any act or undertaking previous to that time.

In *Weller v. Ker* (L. R. 1 Sc. & D. 11), by a testamentary trust settlement, varied by a subsequent codicil,

A. directed trustees to hold his estate to the use of B. in tail, with remainders over, and directed that the estate should be conveyed to B. on his attaining 25; but declared that "in case B. should marry or otherwise conduct himself so as not to merit the approbation of his said trustees," his estate should be a mere life estate, with remainder to his children in fee. B. attaining 21, and before attaining 25, married with the approbation of the trustees: they were aware of the settlements by which (amongst other things) B. charged the said estate with a jointure for his wife, which he could only do in the event of the estate being conveyed to him in fee or in tail. B. subsequently misconducted himself. The approval of the trustees, and their knowledge of the settlement, and the fact that they gave no warning that they might ultimately be obliged to defeat it, made no difference in the duties of the trustees: they were held bound to execute the power so as to cut down B.'s estate to a life interest, although the effect was to defeat the provision for the wife, as well as other claims founded on a confident expectation that the marriage settlement would not be disturbed.

Although a collateral power cannot be released, there may be cases in which, if it were an equitable power, equity would interfere to prevent its execution. In *Hodgkinson v. Quinn* (1 J. & H. 303), a testator, after charging his estate with payment of his debts, devised certain lands to trustees on trusts for his daughters and their families, and after the death of the surviving daughter, to sell, with power to give receipts. The executors took a power of sale for payment of debts, and could have insisted on a conveyance of the legal estate. The V.-C. held that the reasonable construction of the particular will was, that as soon as the time came when the trustees were to exercise their power, and they did

Equitable
release or
extinction.

exercise it accordingly, the first power ceased. He also said that generally any sale by trustees under a power, prior to an actual sale by executors, would be effectual: and that in his opinion the authorities had not gone the length of establishing that after an actual alienation by devisees, the executors could still sell. Mr. Dart (V. & P. 568) points out the difficulty before 22 & 23 Vict. c. 35, s. 14-18, of accepting titles depending on wills which contain charges of debts, and devises of the estates to other persons beneficially. He says that it has been the practice to accept titles from the devisee alone, without requiring evidence of the debts having been paid or causing the executors to concur in the conveyance. Recent decisions, however, tend to raise a very serious question as to whether this practice has not been erroneous, and as to whether the sale should not have been by the executors, or at any rate with their concurrence: even the efficacy of their concurrence has been doubted by many practitioners, upon the ground that the power of the executors to sell, if it exists, is a collateral power, and is incapable of being released. (As to the general question of executors' powers, see *post*, ch. 3, s. 9.)

The implied power of executors to sell real estate before the statute was merely an equitable power: the question, so far as cases of that kind are concerned, would generally be one of equities: and it seems that after a *bonâ fide* sale by a devisee, the Court would not give effect to any attempted sale by executors (*Hodgkinson v. Quinn*): the difficulty would be to decide whether the equity of the purchaser for value is better than that of the creditors, whose claims could not be affected by any release or laches on part of the executors: if the purchaser get the legal estate, it seems however the better opinion that the Court would not interfere to deprive him of it. Mr. Dart (569) says that in cases not within 22 & 23 Vict.

c. 35, it will still be a wise precaution for a purchaser from a devisee to satisfy himself that all the debts have been paid, or to require the executors to authorize the proposed payment of the purchase-money to the vendors. But if the power were really a Common Law Power, such as that given to the executors in *Mower v. Orr*, the question would be one for a court of law, and it is difficult to see how the power of the executors could ever be released: in such a case it seems that all sales should be made by them.

2. Powers appendant or in gross may be suspended or destroyed by the donee.

“I think that every power reserved to a grantee for life, though not appendant to his own estate as a leasing power, but to take effect after the determination of his own estate, and therefore in gross, may be extinguished. In respect of his freehold interest, he can act upon the estate, and his dealing with the estate so as to create interests inconsistent with the exercise of his power must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant” (*West v. Berney*, 1 R. & M. 431). It is of course clear that where there is a general power of appointment with remainder to the use of the donee in fee, a grant of the fee extinguishes the power. A fine, feoffment, or recovery, destroyed the estate and powers of the tenant for life who levied, executed, or suffered it, and he took a new estate by wrong. (Fines and recoveries are now abolished, 3 & 4 Wm. 4, c. 74; and a feoffment has no tortious operation, 8 & 9 Vict. c. 106, s. 4.)

Powers
appendant
or in gross
may be sus-
pended or
destroyed.

In *King v. Melling* (1 Ventr. 225), it was held that a power in the devisee for life to jointure his wife was extinguished by a recovery. In *Tomlinson v. Dighton*

(1 P. W. 149), it seemed to be admitted that where there was a devisee for life with power to appoint to her children, the power would be extinguished by fine (*Bickley v. Guest*, 1 R. & M. 440).

In *Saville v. Blacket* (1 P. W. 777), it was held that a tenant for 99 years, if he should so long live, extinguished his power to charge the estate with a sum of money, by joining in a recovery and resettlement of the estate. And the tenant for life of a trust fund, with power to advance in his lifetime the portions to which his children will be entitled after his death, cannot exercise his power after assigning his life interest so as to defeat or diminish his own grant (*Moel v. Henley*, M'cl. & Y. 302, and see *Stewart v. Ld. Donegal*, 2 J. & L. 636).

Although
the power
is in favour
of children.

It makes no difference that the power is a particular power in favour of children (*King v. Melling*, 1 Ventr. 225). Such a power cannot be called a trust, for the alleged *cestuis que trustent* cannot compel the execution of it; and as it is at the option of the grantee for life to exercise it or not, any dealing with the estate inconsistent with its exercise must determine his option (*Smith v. Death*, 5 Madd. 371). And such a power may also be released (*Cunningham v. Thurlow*, 1 R. & M. 436 n.; *Horner v. Swan*, T. & R. 430).

What will
amount to
a release.

In equity a covenant or agreement not to execute a power operates either entirely or *pro tanto*, as the case may be, as a release of such power (*Hurst v. H.*, 16 B. 372), and that too whether the covenant or agreement be for value or voluntary (*Isaac v. Hughes*, 9 Eq. 191).

Release by
implica-
tion.

A power may also be released, extinguished, or suspended, by implication and without express words, if the intention be clear.

But although a recital may amount to an agreement to release, yet the whole scope and intent of the deed is to be considered (*Boyd v. Petrie*, 7 Ch. 385). The con-

currence of the mortgagor in the transfer of a mortgage, with the benefit of all provisoes, &c., and his covenant to pay a different sum on a different occasion, does not destroy the power of sale contained in the original mortgage deed (*Young v. Roberts*, 15 B. 558).

Power of
sale in
mortgage.

But if there were no assignment of the powers and provisoes contained in the first mortgage, it would be evidence of an intention that they should be extinguished (*ibid.*, *Curling v. Shuttleworth*, 6 Bing. 121).

3. Powers appendant may be suspended or destroyed by the alienation of the particular estate to which the power was attached, if the terms of the instrument creating the power show that such was the donor's intention, but such intention must be clearly expressed. Lord St. Leonard's dictum (Pow. 66) that an alienation of the life estate prevents the exercise of a power of leasing, with the consent of the alienee, must be taken as overruled. There may be cases in which it is plain that the donee of the power meant the execution to be confined to the period during which the donee possessed the estate to which it was appendant. (*cf. Haswell v. Haswell*, 2 D. F. J. 456, *post*, p. 19, where the power was in gross).

By aliena-
tion of par-
ticular
estate,
when.

But, as a general rule, a power appendant may be exercised, although the estate to which it was appendant be gone, provided only that such exercise does not derogate from the previous grant of the donee of the power (*Alexander v. Mills*, 6 Ch. 124).

Generally
alienation
does not
destroy
power.

In that case, trustees of settled estates had a power of sale, to be exercised at the request and direction of H., the tenant for life, who was also entitled to the ultimate reversion in fee.

Absolute
alienation.

H. made an absolute conveyance of all his estate and

interest for value. It was held that H.'s power to consent was not extinguished by the absolute alienation of his life estate, but could be still exercised with the concurrence of the alienee.

In *Warburton v. Farn* (16 Sim. 625) the facts were the same as those in *Alexander v. Mills*, the only difference being that the power of consenting to a sale was expressly reserved, and the assent of the purchaser of the life estate thereby made unnecessary.

In *Long v. Rankin* (Sug. Pow. 895), tenant for life with power of leasing, aliened his life estate by way of security, reserving the right to exercise his leasing power with the consent of the alienees. The House of Lords held that the power could be validly exercised.

Bank-
ruptcy.

In *Holdsworth v. Goose* (29 B. 111), a power of consenting to a sale, similar to that in *Alexander v. Mills*, was held to be not extinguished by the bankruptcy of the tenant for life, but that a good title could be made with the assent of the bankrupt and his assignees.

In *Eisdale v. Hammersley* (31 B. 255), the decision went a step farther, for the assignees in bankruptcy had sold the life interest, and it was held that, with the consent of the persons in whom such life interest had vested, a good title could be made. (And see *Simpson v. Bathurst*, 5 Ch. 193; *Lord Leigh v. Ashburton*, 11 B. 470; *Jones v. Wenwood*, 10 Sim. 150; and *Leceire v. Beaudey*, 21 W.R. 487.)

Con-
ditional
alienation.

And as powers appendant are not affected by the absolute alienation of the life estate to which they attach, *à fortiori* they are not affected by a conditional alienation thereof, as by mortgage (*Tyrrell v. Marsh*, 3 Bing. 31).

Powers of this nature are given for the benefit of the inheritance; *e.g.*, that of leasing, as providing the means of keeping the land in a proper state of cultivation;

that of sale, as enabling the tenant for life to dispose of outlying property, or of the whole estate, if the circumstances of the family prove unequal to the luxury of a landed property. The security of the remaindermen depends on the conditions and qualifications under which the power is to be executed, and not upon the estate or interest of the person by whom it is to be executed. It, appears, therefore, to make no difference whether the power is one of leasing or of sale ; in either case it is exerciseable generally after alienation.

4. Lord St. Leonards (Pow. pp. 54-56) cites the case of *Bringle v. Goodson*, 4 Bing. N. C. 726, as establishing "that there is no absolute suspension of a power of leasing by the grant of a term of years out of the estate of the tenant for life ; but that, although no right is reserved by the tenant for life to execute his power, as between him and his grantee, he may exercise it, and if his life estate is overreached by the exercise of another power in another person, the grant by him shares the same fate, and the lease under his power, and the estate under the other power, operate just as if they had been created in that succession by the creator of the power."

Does the grant of a term of years suspend a power of leasing ?

5. It is often a question of some difficulty whether a power is or is not paramount to an existing estate tail, and, accordingly, whether it is destroyed or not by a disentailing deed or a recovery.

Question whether a power is paramount to an estate tail or not.

A power is nothing more than a modification of an use. The settlor, instead of declaring the uses himself, directs that another person shall have a power of declaring to what uses the estate shall remain, and when the power is executed it is the same thing as if the settlor himself had declared the uses. If, therefore, there be a limitation to the use of A. for life, with remainder to B. in tail, and a power of sale be given to trustees with A.'s consent, the uses to be declared by

the trustees on the execution of their power are to be taken as if they had been inserted in the instrument creating the power. If, therefore, B. were to suffer a recovery, or to execute a disentailing assurance without A.'s concurrence, the power of sale would be unaffected thereby (*Roper v. Halifax*, 8 Taunt. 845); the same would be the case if a recovery was suffered or assurance executed, and the power was expressly reserved; or if it was clearly the intention of the parties that it should be reserved (*Hill v. Pritchard*, Kay, 394). And so, too, although the whole estate of the donee of the power be conveyed away, if it be by way of resettlement and the prior uses are relimited, and the prior powers of sale and exchange saved and confirmed, although present powers of sale and exchange are reserved by the new settlement to different persons (Sug. Pow. 71).

In the cases of *Roper v. Halifax* and *Hill v. Pritchard*, the power was held to be antecedent and paramount to the estate tail. It was to be exercised in both cases with the consent of the tenant for life, and, therefore, no act of the tenant in tail could bar the power. In the former case the tenant in tail only was vouched; in the latter, the tenant for life joined, but on the words of the disentailing deed, was held not to have intended to give up her power.

It appears that if any case were to arise in which the power was strictly a mere shifting use, Lord St. Leonards's argument in *Roper v. Halifax* (Sug. Pow. 901) would prevail, and it would be held to be extinguished. For example: if A. were tenant in tail in possession under a settlement which contained a power of sale to trustees, and he acquired the fee by executing a disentailing assurance, the power would be gone, not only on the above ground, but also because (as after stated) a power cannot exist any longer than the purposes for which it

was created require. If once an estate in fee has been acquired by anyone claiming under the limitations of the instrument by which the power was created, it naturally ceases (and cf. *Lantsbery v. Collier*, 2 K. & J. 720-22; *Cole v. Sewell*, 4 Dr. & War. 1).

6. A power in gross is independent of the donee's estate, and may be exercised at any time, as well after as during the continuance of his interest (*Parsons v. Parsons*, 9 Mod. 464). Powers in gross.

But the power may be extinguished by necessary implication arising from the words of the instrument by which it is created (and see Sug. Pow. 79).

In *Haswell v. H.*, 2 D. F. & J. 456, a fund was settled in trust for the husband for life, or until (amongst other things) insolvency, with remainder to his wife for life, remainder to their children or issue, as the survivor should appoint, and in default, "from and after the several deceases of the husband and wife, or the sooner determination of the interests thereinbefore limited to them respectively, in trust for the children then living, and the issue of deceased children then living, the shares of such as should have attained 21 to be immediately paid and transferred to them, and the shares of such as should not then have attained the age of 21 years, to be immediately paid and transferred to them on attaining that age." The husband's interest ceased through his insolvency, and his wife afterwards died. Lord Campbell (affirming the Master of the Rolls) said that he quite agreed to the position that the husband's power of appointment was not extinguished on his insolvency. It was a power in gross, and could have been exercised at any time, not only while his own interest continued, but while the interest of the wife continue. But he considered there was a clear indication When extinguished.

Not extin-
guished.

in the settlement that the power in question was to be exercised while the interest of the husband or of the wife continued. He was much struck (apparently) with the question, what was to be done with the fund until appointment? It is submitted that this is an unsatisfactory ground of decision; the case, however, does not profess to limit the generality of the rule above stated, and would probably only be followed under circumstances precisely similar. Lord St. Leonards disapproves of it (Pow. pp. 261-2). In *Wickham v. Wing* (2 H. & M. 436), the subject of the power was real estate, and the power had been exercised after the appointor's estate had determined by his bankruptcy. This appointment was upheld. The devise was to trustees on trust to pay the rents and profits to T. P. W. for life, or until he should become bankrupt or insolvent; and from and after his decease, or from and immediately after his bankruptcy or insolvency, to the use of the children of T. P. W. as he should appoint, and in default to all the children equally. Lord Hatherley (then V.-C.) said that the case of *Haswell v. Haswell* was peculiar, but it was decided on the special words of the settlement. The settlement which related to personalty only contained two inconsistent directions: one, that the survivor of husband and wife should have power to appoint the fund; and the other, that the fund should be paid over immediately the children should attain 21: and the Court had to choose between these two inconsistent directions. He also distinguished the case before him on the ground that the subject-matter was real estate; but it is doubtful if there is any substantial distinction between cases where realty and cases where personalty is the subject-matter of the power.

In *re Stone* (I. R. 3 Eq. 621), a testator gave his daughter a life estate in *lands*, and devised them after her death among her children, as she should by deed or

will appoint. He also declared that if his daughter should alien or incumber her share, it should go to the persons next in remainder as if she were actually dead. She mortgaged her life estate, and subsequently executed her power of appointment. The Court distinguished *Haswell v. Haswell* on the ground that the power was expressly given to be exercised during the continuance of the estates given, that is, either as of necessity during the life estates, or during the existence of the estate otherwise determinable, because in very terms it provided that on the sooner determination the property should go as then appointed, to the extent appointed, and otherwise, as if no appointment were made. In the case before the Court, the power being expressly given in general terms, which could be exercised during the entire life of the donee, and the exercise of which was not by any words limited to the period of her enjoyment of the estate, it was held that the mere acceleration of the estates in remainder did not defeat that power.

In *re Aylwin* (16 Eq. 585 ; 21 W. R. 864), a testator devised his interest in certain colliery leases and lands to trustees on trust (among other things) for his son Herbert during life or until bankruptcy or insolvency ; and on his death, bankruptcy, or insolvency, to pay and apply the same for all or any of his children as he should appoint, and in default for the children equally. V.-C. Wickens considered that the power (which was a power to direct the payment of the rents of leaseholds as received, and which, so far, resembled *Wickham v. Wing* more nearly than *Haswell v. Haswell*) must be considered as unaffected by the insolvency, and that it was therefore a subsisting power. On the whole it may be inferred from the above cases that in cases of real estate, and possibly of chattels real also, a power in gross is not affected by the extinction or suspension of the appointor's estate ;

Result of
cases.

and the same may be said with regard to personalty, except in a case like *Haswell v. Haswell*, where there are inconsistent directions. But even in such a case, unless the words were identical with those in *Haswell v. Haswell*, it would seem probable that the power would be held to be still subsisting, unless there was a very clear intention expressed to the contrary.

Powers are not extinguished or suspended by marriage.

7. The marriage of the donee of the power does not extinguish or suspend the power.

In *Whitmarsh v. Robertson* (1 Coll. 570) a sum of stock was vested in the trustees of an ante-nuptial settlement for the benefit of the intended husband and wife during their joint lives and the life of the survivor, and then for the children of the marriage, with power to the trustees to advance part of the fund with the consent of the wife. The husband died, and the widow married again: no settlement was made, and she subsequently concurred with her husband in executing an assignment for valuable consideration of her life interest. V.-C. Knight Bruce held that the wife's second marriage did not affect her power to consent; that, consequently, no act of her husband's could make any difference; and that as the assignment was not in conformity with the power, her execution of it was a mere nullity.

Before the abolition of fines and recoveries (3 & 4 Wm. 4, c. 74) a married woman could not release or extinguish a power affecting real estate, except by fine or recovery: she may now do so by deed acknowledged and with the concurrence of her husband (s. 77); and she may in the same manner release powers affecting her reversionary personal estate: see 20 & 21 Vict. c. 57: *post*, ch. 4, s. 3.

Judicial separation does not affect joint powers.

Although she may be separated judicially from her husband, she may still join with him in the joint exercise of a power (20 & 21 Vict. c. 85, s. 26).

8. A power given to the owner of a particular estate, whether appendant or in gross, is extinguished by his acquisition of the fee-simple (*Cross v. Hudson*, 3 Bro. C. C. 30).

Powers extinguished by merger in the fee.

But equity will interfere to effectuate the intention of the parties in certain cases, by making the intent of the person purporting to execute the power bear out the disposition he has affected to make (*Cross v. Hudson*)

In *Mortlock v. Buller* (10 Ves. 292), the power of trustees for sale under a settlement was at law extinguished by the tenants for life's acquisition of the fee. Lord Eldon said, that if the purchaser had entered into a contract with the trustees with the approbation of the tenant for life according to the deed, the contract once entered into and having bound the estate, should be made good by those who had got an interest, by the effect of their interest, if not by the authority of the trustees.

When the owner of the particular estate becomes seised in fee, the powers which he possessed over that estate cannot be any longer exercised, not so much on the ground that they have become merged in the fee, as because they were not intended to continue longer than is required for the purposes of the settlement; it follows therefore from this (as well as from the other principle next mentioned (s. 9), that appointments under powers which fail shall be made good out of the appointor's estate in the property appointed), that an appointment made under a power will be upheld in equity, although the donee thereof has acquired the fee since he made the appointment.

When execution sustained.

In *Sing v. Leslie* (2 H. & M. 68), estates were settled on A. for life, with remainder to B. for life, with remainders over for life and in tail, with an ultimate remainder to B. in fee; the settlement contained a power

for every tenant for life, either before or when he should become entitled to the actual freehold, to charge the estate, but any charge by a tenant for life was to be inoperative, unless he or his issue afterwards became so entitled. B. by his will in exercise of that power and of every other power enabling him, charged the estate, and disposed of his reversion; B. died without issue in A.'s lifetime. The intermediate estates having failed, and B. being entitled to the reversion in fee, the charges were established against his devisee out of his estate. In the events that happened, B.'s power never arose; if he had survived A., still the power would not have been in existence, for he would have had the fee.

Merger of charge.

In the converse case, when a power of charging has been exercised in favour of an object who afterwards becomes entitled in fee, the charge will merge, unless the person entitled to it keep it alive; but he will be presumed to intend to keep it alive, if it is for his interest (*ibid.*; *Grice v. Shaw*, 10 Ha. 76).

Powers extinct when purposes completed.

9. A power, whether appendant or in gross, is absolutely extinguished when the purposes for which it was originally created have ceased to exist (*Wheate v. Hall*, 17 Ves. 80). But it subsists until all the trusts are exhausted, and till the whole estate is vested in fee in the person or persons entitled (*Taite v. Swinstead*, 26 B. 525).

In *Wolley v. Jenkins* (23 B. 53), the M. R. said that a power of sale and exchange in a settlement ceased to exist after the union of the life estate with the reversion in fee; that such a power existed only for the purpose of the settlement, and during the time when the uses of the

settlement were in existence. But the object for which the power is given is in each case to be considered.

In *Trower v. Knightley* (6 Madd. 134), where there was a devise in trust in undivided moieties with a power of sale *during the continuance of the trust*, and one moiety vested absolutely, it was held that the power of sale must have been intended to continue until there were owners competent to deal with the whole estate.

In *Wood v. White* (4 M. & C. 460), where the property was devised in fifths, and there was a power of sale with a direction that it should continue as to such parts, if any, of the premises as should be subject to continuing trusts, it was held that the power had determined as to one fifth, the trusts of which had been exhausted, there being no necessity that the power as to the one share should continue in order to preserve it for the benefit of the other shares, as in *Trower v. Knightley*. Nor does it make any difference that the interests of the persons whose disability occasions the need of using the power arise by virtue of an appointment made in execution of a power in the original instrument, and were not contained in such original instrument. In such a case the limitations under the appointment are to be considered as if they had been inserted in the original settlement.

In *re Brown* (10 Eq. 349), lands were, by marriage settlement, conveyed to the use of trustees and their heirs upon trusts for the husband and wife for life, and in default (which happened) of children of the marriage for the children of A. as the wife should appoint. The settlement contained the usual power of sale. The wife appointed to the trustees and their heirs upon trust (subject to the life estates) as to four-fifths for B., C., D. and E., four of the five children of A. and their heirs as tenants in common, and as to one-fifth for F., the fifth child of A. for life with remainder over. F. was of unsound mind,

not so found. B., C., D., E. and F. were all *in esse* at the date of the settlement, and were still living, and all except F. *sui juris*.

V.-C. James said, "There is great force in the argument that directly the property gets into the hands of persons who are able to dispose of it absolutely, the power of sale must be gone. It is like the case of a power which is destructible directly the property vests in a tenant in tail in possession, who can, if he pleases, dispose of the whole estate. But I must consider the limitations under this appointment as if they had been inserted in the original settlement. That is a safe general rule to act upon, and it must be carried out whether for good or for evil. If they had been inserted in the original settlement, I think there is sufficient authority to show that as long as there is a settled estate in any part of the property subsisting, so long does the power remain in existence."

Power not necessarily extinct by being exercised.

10. A power is not necessarily extinguished by having been once exercised.

Thus it is clear that a leasing power may be exercised from time to time as occasion arises.

And in *Versturme v. Gardiner* (17 B. 338), a power to trustees to lend £2,500 to the tenant for life was held not to be extinguished by one loan, but that, after repayment, the sum might be again advanced.

So, if an alternative power be given (*e.g.*, to raise money by sale or mortgage), the fact that the donee has exercised the power by mortgaging the estate does not preclude him from afterwards exercising the power of sale in order to pay it off (*Omerod v. Hardman*, 5 Ves. 722, 732). Of course if the charge had been absolutely extinguished, the power of sale could not have been used for any other purpose. So, a power of appointment

among children may be exercised from time to time as occasion requires. And a power to jointure may be exercised in favour of the same wife at different times, provided that all the executions taken together do not exceed the limits of the power (*Hervey v. Hervey*, 1 Atk. 560).

11. A power may co-exist with the fee.

If a man limits his estate to such uses as he shall appoint, and in the meantime and until such appointment to the use of himself and his heirs, the fee simple continues to reside in the settlor, subject to be divested by an exercise of his power of appointment (Co. Litt. 216a, note; *Maundrell v. Maundrell*, 10 Ves. 246).

A power
may co-ex-
ist with the
fee in free-
holds,

In *Glass v. Richardson* (9 Ha. 698; 2 D. M. & G. 658), the question was whether, under a devise of copyholds to such uses as A. and B. should appoint, and subject to and until such appointment, to A. and B. in fee, A. and B. could make a title to a purchaser without being admitted. It was held that they could, and specific performance was decreed. The defendants contended before the Vice-Chancellor that in the case of freeholds, the co-existence in the same party of the fee and of the power to appoint the fee, depended wholly on the Statute of Uses; and that the Statute of Uses not applying to copyholds, the power and fee could not co-exist. But this argument assumed that, in the case of copyholds, the power and the fee could co-exist, which could not be the case, at all events before admittance, as the devisee takes no estate until admittance; and to adopt this argument would be to apply to estates not in any manner affected by the Statute of Uses, doctrines and doubts affecting conveyances of estates operating under that statute, and which, after what fell from Lord Eldon, in *Maundrell v. Maundrell*, the Vice-Chancellor felt warranted in saying never had any solid foundation.

and copy-
holds.

CHAPTER III.

CREATION OF POWERS.

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1. There are three requisites to the valid creation of a power, namely, sufficient words to denote the intention, an apt instrument, and a proper object (*Sug. Pow.* 102). The instrument by which powers may be created have been already considered. It is now proposed to consider what words will denote an intention to create a power.

Three requisites.

2. No technical or express words are necessary, either in a deed or in a will, to create a power, if the intention be clear

No technical words necessary if intention be clear.

In *B. of Oxford v. Leighton*, 2 Vern. 377, a marriage settlement contained a provision that, in default of issue, the trustee should convey to such uses as the survivor of the husband and wife should appoint; this provision amounted to a power of revoking and limiting new uses. So a recital in a deed or an exception out of a prohibition may be sufficient. In *Read v. Nashe*, 1 Leon. 147, an estate was devised in strict settlement (A. being the first tenant in tail), and contained a provision that if A. should alienate otherwise than for jointures for life, or for leases for twenty-one years, he should forfeit his estate; this gave A. a power of jointuring and leasing.

Exception. Recital.

In *Tait v. Lathbury*, 1 Eq. 175, a settlement of personality contained a power of sale and investment in real estate, and a direction that such real estate should be considered as personality for the purposes of the settlement, but contained no express power of sale over the real

By implication.

Ex necess
tate rei.

estate to be purchased. The original power of sale was held to extend to the purchased real estate, and see *Master v. De Croismar*, 11 B. 184. In *Downes v. Timperon*, 4 Russ. 384, a testator by his will gave real and personal estate to a married woman; and by codicil he declared that if she should die without disposing by will of such interest as she took under his will, such interest should go to her children. This gave her a power, as she could not otherwise have disposed of her interest, being covert.

In *Wood v. White*, 4 M. & Cr. 460, a testator gave (amongst other things) one-fifth of his residuary real estate to trustees on trust for his daughter till 25 or marriage, with a direction that, if she married under that age, her one-fifth should be conveyed and settled on certain trusts, and he gave the trustees a general power of sale. On the daughter's marriage, a settlement was executed which recited that no part of the real estate had been sold, though it was intended that the same should be sold under the power contained in the will, and assigned all the daughter's share of the produce of the sale on certain trusts. The power of sale contained in the will was held to have determined on the daughter's marriage; but the settlement, showing a clear intention for a conversion of the realty into money, and a dealing with and settlement of money, which could only arise from such conversion, and being made between trustees, who alone could make the conversion, and the *cestuis que trusts*, who alone could direct it, was held to give an implied power of sale, although it did not in terms direct it. The Lord Chancellor (p. 481) considered the rules applicable to the implication of power of sale in wills to be strongly analogous, the power being implied for the purpose of carrying into effect the declared intention.

A power of appointment may, it seems, be implied from the use of the word assigns.

Power implied from the word assigns.

In *Tapner d. Peckham v. Merlott*, Willes, 179, there was a devise to A. for 99 years, if he should so long live, and after divers remainders, an ultimate remainder to the heirs and assigns of A. If A. had had an estate of freehold, instead of for years, the rule in *Shelley's Case* would have applied; the contest was between the heir and the devisee of A. The case was decided on another point; but L. C. J. Willes said: "Another answer suggested itself to me, on which I will give no mature opinion, because there is no occasion; but I think there is some weight in it, that this word [assigns], though it does not alter his (the termor's) own estate, must give him a power of disposing of it. For supposing this last remainder had been to him and his heirs, or to such other persons as he should appoint, he might certainly in that case have disposed of it by his will, and I am inclined to think, as at present advised, that the word 'assigns' may admit of this construction."

In *Quested v. Michell*, 24 L. J. Ch. 722, a testator gave real and personal estate to the use of trustees to pay the rents to his niece for life; and after her death he gave, devised, and bequeathed his real and personal estate to the heirs, executors, administrators, and assigns of his said niece. The rule in *Shelley's Case* did not apply, as the life estate was equitable, and the remainder legal. As to the personalty, the niece took it absolutely; as to the real estate, it was contended that the niece had only a life estate, with no power to dispose of the reversion after her death, since the estate was limited to her heirs by way of purchase. V.-C. Kindersley said: "The expression heirs and assigns" is a common one, and is often used without meaning anything more than the limitation of an absolute interest; but in this case it is impossible to give any

meaning to the word, unless you attribute to the testator an intention to give the life-tenant a power, by virtue of which she could give an estate to some other persons in the character of assigns distinct from her heirs. And he accordingly decided that there was a limitation after the death of the life-tenant, to the persons who should answer the designation of her assigns, and that that could only be done by giving her an absolute general power of appointment, and in default of appointment, to her heirs.

In *Brookman v. Smith*, L. R. 6 Ex. 291, the Court, although expressly refraining from impeaching the case last cited, said that, in general, the words "and assigns" following the word "heirs" have now no operation. "The words, 'to assigns for ever' have at the present day no conveyancing virtue at all, but are merely declaratory of that power of alienation, which the purchaser would have without them." (Williams, R. P., 8th ed. 141.) It is to be observed that in *Quested v. Michell*, the niece had no power of alienation except such as was to be implied from the use of that word "assigns," and the Vice-Chancellor gave effect to what he considered the intention. In the case in the Exchequer, which was decided and affirmed (7 Ex. 271) on other grounds, the ultimate limitation was to the heirs and assigns of the life tenant, a married woman, as if she had continued to be unmarried. (See the case stated, in the next section). This limitation was contained in a will by a father made in execution of a covenant contained in the daughter's marriage articles. The Court thought that the term "heirs and assigns" was used in the ordinary conveyancing meaning; it was so used in other places in the will. Moreover, in the corresponding limitation in the articles, the word "assigns" was omitted; but their opinion was based on what they considered the testator's intention. And the Court of Exchequer chamber expressly refrained from giving any opinion on this point,

which they appeared to think by no means clear. It is only necessary that the intention to create a power should be clear, but it is frequently difficult to determine, whether it is intended to pass an estate, or merely to give a power; and supposing a power to have been created, of what nature and extent it is.

3. As a general Rule, if an estate for life be first given and a power of disposition by deed or will added, this does not amount to an absolute gift, so as to vest the property in the donee, and to enable it to pass to his representatives in estate, if he do not exercise his power of appointment.

Gift for life with power added does not give absolute estate if power be not exercised.

The distinction is perhaps slight which exists between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power of disposition by deed or will. But that distinction is perfectly established: that in the latter case the property vests. *Bradley v. Westcott*, 13 Ves. 453.

The rule applies equally to real and to personal estate (*Reith v. Seymour*, 4 Russ. 263). In that case a testator, by his will, gave all his personal estate to his wife for life, and from and after her decease, one moiety thereof was to be at her disposal either by will or otherwise: this was held to amount to an estate for life with a power of appointment: and see *Nannock v. Horton*, 7 Ves. 391.

In *Espinasse v. Luffingham*, 3 J & L. 186, the testator bequeathed to his wife "all the household furniture and moveable goods and chattels in and belonging to my said dwelling-house and premises, except my books. I also bequeath to her the use of my plate, with power to dispose of such portion thereof as she shall think proper."

Gift of use of plate.

The Lord Chancellor considered that the testator's intention clearly was, to confine the wife to the enjoyment for her life of the plate, but with a power of disposition of any part. The testator began a new bequest, and altogether changed his language; he knew how to give personal property absolutely, and used proper language for that purpose. It was not, therefore, a case in which a bequest in those terms stood alone.

In *Pennock v. Pennock*, 13 Eq. 144, a testatrix in execution of a power, appointed shares of real estate to her husband in trust to stand possessed thereof and to enjoy the rents and profits "for his own absolute use and benefit for and during the term of his natural life, with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit, and from and after his decease" over. This gave the husband a life estate with a power of appointment. Compare *Archibald v. Wright*, 9 Sim. 161, and *Holloway v. Clarkson*, 2 Ha. 521, but see *Reid v. Atkinson, Jr.* R. 5 Eq. 373, where the words were (following a gift of all his real and personal estate to his wife) "to have, hold, and enjoy in the fullest and amplest manner for the term of her life, with full power to dispose of all the aforesaid property, both real and personal, as she may judge wisest and best." The point *decided* was that these words precluded any precatory trust, but L. J. Christian says (pp. 382-3): "It was assumed on both sides that the effect of the will was to give the testator's wife an estate for life only, with a power of appointment superadded. Now I am not sure at all that such is the effect of this will; and I am speaking here, not so much regarding the technical result of the limitations, as of the intention which the language holds up to us as having been actually present to the testator's mind. . . . Full enjoyment during life, full power to dispose of, these things exhaust the ad-

Dictum of
L. J. Christian to the
contrary.

vantages of property, and are comprised in the very idea of property," and he thought the better construction of the will was the one which would make the wife the universal recipient of everything, "with a lavish accumulation of language directed to show that her enjoyment and dominion were to be as boundless as the limit of human life and the nature of human proprietorship admitted the possibility of." As the wife had made a will sufficient to execute the power (p. 163) it was unnecessary to decide this; but the cases above cited seem to show that the limitation of an estate for life with a superadded power of disposition has acquired a technical meaning, and it is a well-known rule that technical words, bearing a known legal import, must have effect given to them (Hawkins on Wills, citing *Roddy v. Fitzgerald*, 6 H. L. C. 877).

A gift to a married woman for her separate use for life without restraint on anticipation, with remainder as she should notwithstanding coverture by deed or will appoint, with remainder to her executors or administrators, is an absolute gift to her sole and separate use. *Chartered Bank, &c. v. Lempriere*, L. R. 4 P. C. 573, 595.

And a bequest to a female (whether sole or covert) for her separate use for her life, and after her decease to such persons as she should appoint, and in default of appointment, to her executors, administrators, and assigns, amounts to an absolute gift. Although the power of appointment is in effect only testamentary (see Section 4), yet as the executors could only take the fund as part of the female's estate, she could dispose of it at once, and her executors could not dispute or claim in opposition to the act of their testatrix (*Holloway v. Clarkson*, 2 Ha. 521). And if the donee of a general power of appointment over a fund appoint by deed to his own executors and administrators, the effect is to make the appointed

Gift for life with remainder to general appointees by deed or will, with remainder to executors and administrators.

Gift for life with remainder to appointees by will, remainder to executors and administrators.

Appointment to executors

and administrators of appointor.

Secus, if there is no ultimate remainder to executors and administrators.

property part of his personal estate. *Mackenzie v. Mackenzie*, 3 Mac. & G. 559.

But it seems clear that the mere fact of the donee being a married woman is not enough to make the absolute interest vest, if there be no ultimate remainder to the executors and administrators of the married woman.

There is a dictum of Lord Romilly's, in *Trimmell v. Fell*, 16 B. 537, 541, opposed to this. He says: "I entertain no doubt that where an estate or a sum of money is vested in trustees for a married woman for life, and afterwards to the use of such persons as she should by will appoint, she would, on surviving her husband, acquire the absolute interest in the property, and that the fact of her so surviving and acquiring the absolute interest in the property, would not of itself affect any previous disposition by will she might have made." This was not necessary to the decision in the case, and is distinctly opposed to his lordship's subsequent decision in *Scott v. Josselyn*, 26 B. 174, as well as to other authorities. In that case a residuary estate was given to trustees on trust to permit the testator's wife to receive the income for life, and also to apply such parts of the capital to her own use as she should think proper, and after her death to apply the residue as she should by will appoint. The Master of the Rolls said it appeared to be plain that the widow took a life interest in the property, with a power to appoint the principal by will. See *Hoy v. Master*, 6 Sim. 568. But quære whether the head-note is not incorrect; the will (before the Wills' Act) is not given in full, so that it does not appear whether it would have been sufficient to execute the power; the point at issue was whether a precatory trust had been created; the decision was, not (as in the head note) that the widow took absolutely, but that the property subject to the power passed

by her will, which might mean either that she had executed her power of appointment, or that she took absolutely.

If the subject matter of the power is real estate, and there is a remainder in default of appointment to the heirs of the life tenant, the life estate and the fee will coalesce, by the rule in *Shelley's Case* : and it seems that the right to defeat the estate given and to make those take by purchase, who, if the power were not exercised, would take by descent, cannot vary the construction of the gift. But it will be otherwise, it seems, if the heir be *persona designata*. In *Brookman v. Smith*, L. R. 6 Ex. 291 (affirmed on another point, 7 Ex. 271), there was a devise by a testator (in execution of a covenant in his daughter's marriage articles) of real estate to the use of the husband for life, with remainder to the use of the wife for life, with remainder to the use of the issue of the marriage ; the ultimate limitation was in case every child born or to be born should die under 21 and without leaving issue, then to the use of the heirs and assigns of A. as if she had continued sole and unmarried. These words would have precluded A.'s own son, if she had married again and had one, from succeeding ; they were held, therefore, to point to a *persona designata*, and not to be words of limitation.

Rule in
Shelley's
case.

A devise to A. for life, and after his death to the heirs of his body as he shall by deed or will appoint, and in default of appointment, to the heirs of the body of A. as tenants in common, with a devise over in fee for want of such issue, gives A. an estate tail, according to the well-known rule that technical words must have their legal effect, unless it is perfectly clear that the testator meant otherwise. *Jesson v. Wright*, 2 Bligh 1, Sug., Property in H. of L. 250, *Doe d. Cole v. Goldsmith*, 7 Taunt. 209. Lord St. Leonards is of opinion that the power in such a

Remainder
to the heirs
of the body
of life
tenant as
he shall
appoint.

Power exer-
ciseable.

case may be exercised in favour of any of the objects of the power within the line of perpetuity. (Pow. 675.)

Remainder to the heirs of the body of A. as he shall appoint in personalty.

Words which would create clearly and distinctly an estate tail in realty will give an absolute interest in personalty, but in order to do so the words must be clear and distinct; and, moreover, not every form of expression which will create an estate tail in realty, will create an absolute estate in personalty. *Forth v. Chapman*, 1 P. W. 663. The principle is, that if the testator uses technical words which indicate a clear meaning that the property should go in a course of devolution until there is an exhaustion of the heirs of the body, as that cannot be carried into effect, they give an absolute interest. (*Ex parte Wynch*, 5 D. M. & G. 206.)

Direction for maintenance of and division among the heirs.

In re Jeaffreson, 2 Eq. 276, a testator gave the residue of his estate, consisting wholly of personalty, to trustees on trust for A. for life, and after her death "for the benefit of the heirs of the body of A., first to educate at their discretion the said heirs, and lastly to pay to the said heirs the said residue at their respective ages of 21, in such proportions as A. might by deed grant or by will direct." This was held not to be an absolute interest in A. V. C. Wood said that upon such a gift of personal estate as that, the question was not whether the construction of the clause, taken simply word by word, would give an estate tail, but whether, regard being had to the whole will, considering that the property was personal and not real estate, there was an intention manifested that "heirs of the body" should be used in its proper sense.—"Without pausing to consider whether the set of words used here would bring this case within the rule in Shelley's case, regard being had to the decision of House of Lords in *Jesson v. Wright*, I think the use of words like these, when accompanied with a discretionary power of education for these heirs of the body, and with an

express discretion for division at 21, justifies me in saying that the testator did not point to heirs *successivè*, who are to continue proprietors of the fund in question to an extent which the law would not allow, and which the law would cut short by giving the fund to the first taker."

The word "issue" in a will *primâ facie* means the same thing as "heirs of the body," and is to be construed as a word of limitation; but this *primâ facie* construction will give way if there be on the face of the will an intention that the word is to have a less extended meaning. *Slater v. Dangerfield*, 15 M. & W. 263. Where in a devise there is a gift over on general failure of issue, it is presumed that the word issue has been used by the testator as meaning heirs of the body; and it is for the party seeking to give it a meaning other than that which it frequently bears, to show clearly from the context of the will that the testator intended to give it a different meaning. (*Roddy v. Fitzgerald*, 6 H. L. C. 823.)

In that case lands were devised (in 1817) to A. for life, and after his death to his lawful issue, in such manner, shares, and proportions as he by deed or will should appoint, and for want of such appointment to the issue equally, and on failure of issue to B. The testator had in effect two intentions: one, that the gift over should not take effect till all the issue of the first taker was exhausted: the other, that the issue should not take in the ordinary course of descent. Of these the latter intent was obliged to give way, and the power of appointment did not vary the case, as it only showed that the testator did not contemplate equality of interests as essential (pp. 872-3).

But in every case, however general the words may be, they may be restrained and limited by the context, whenever it clearly appears that they were intended to be used in a more restricted sense. Thus, if there are words of

Secus, if there be a gift to issue, either express or

implied,
coupled
with words
of distri-
bution.

distribution, together with words which would carry an estate in fee, attached to the gift to the issue (whether such gift be express or implied), the ancestor will take an estate for life only. It is the vesting of the fee in the issue, and not the words by which it is vested, that prevents the necessity of implying the estate tail in the parent for the purpose of carrying out the intention that the estate should not go over till the exhaustion of the particular line. In such case, no estate tail is to be implied in the parent, but the fee is to be considered as vesting in the issue, whether the words giving the fee are direct words of limitation, as “to the issue and their heirs,” or whether the fee can be held to be vested in them from the use of such expressions as estate, &c., or by implication from a power to appoint the fee to them, per Crompton, J., in *Roddy v. Fitzgerald*, 6 H. L. C. 855. In *Bradley v. Cartwright*, L. R. 2 C. P. 511, the devise (in 1806) was to A. for life, with remainder to trustees to preserve, and after A’s. death “to the use of all and every the issue child or children of the body of A., in such shares and proportions, manner and form, as A. should appoint: and in default of such issue” (not in default of appointment) over. A. was held to take an estate for life only, with a power of appointment super-added.

As to the use of the word “issue” as a word of limitation and otherwise, see *Vaughan Hawkins on Wills*, 189, & 2 Jarm. 3rd Ed. 437, where the following rules are stated :—

- 1stly. Where words of distribution, but without words to carry an estate in fee, are attached to the devise to the issue, and there is a gift over in default of issue of the ancestor generally, or in default of such issue, or in default of issue living at the death of the ancestor, the ancestor takes an estate tail.

2ndly. Where the gift is as in the last proposition, but there is no gift over in default of issue, still, since the issue taking by purchase could only take for their lives, the ancestor is held to take an estate tail, which, if not barred, will descend to his issue, this being the only mode of carrying the inheritance to the issue.

3rdly. Where words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, the ancestor takes an estate for life only, and the result is the same whether the fee is given by the technical words "heirs and assigns," or by such words as "estate," "part," "share," &c., occurring in the description of the subject of the gift, or words imposing a pecuniary charge upon the issue, and whether the gift to the issue be direct or by implication from a power to appoint to them, and whether there is a gift over on general failure of the issue of the ancestor or not. This rule is confirmed by *Bradley v. Cartwright*, 2 C. P. 511, *suprà*.

These rules apply to wills before the Wills Act; since that act, a devise to the issue without more gives the fee: it seems to follow, therefore, that every devise to a person for life, and after his decease to his issue, in words which direct or imply distribution between the issue, gives the issue an estate in fee in remainder by purchase.

Since
Wills Act.

4. In cases where it is clear that a gift for life with a superadded power is intended, it is often difficult to decide whether such superadded power is intended to be exerciseable by instrument *inter vivos*, or to be exerciseable only by will. The authorities are conflicting, but the rule to be extracted from them appears to be that—

Power after
life estate,
whether
exercise-
able by
deed, or by
will only.

If there is in the power any reference to the period of the donee's death, sufficient to specify an intention that the power should be then and then only exercised, or if there be any other indicium of an intention to tie up the property, the power will be exerciseable only by will.

It seems doubtful whether a reference to the death of the donee of the power and the life estate, without more, is enough to make the power testamentary: Lord St. Leonards (Pow. 210) says not; but this appears to be now overruled. In *Freeland v. Pearson*, 3 Eq. 658, a testator gave his wife all his property for her sole use during her life, and directed her to pay his debts, &c., "and at her decease to make such a distribution and disposal of all my then remaining property among my children as may seem just and equitable according to her best discretion and consideration." The Master of the Rolls held that the power could be exercised only by will in favour of children who survived the donee.

In *Kennedy v. Kingston*, 2 J. & W. 431, there was a bequest to A. for life, "and at her decease to divide it in portions as she shall choose to her children." It was held that the children who were living at her death were the only objects of the power, and were, as such, entitled to a share lapsed by the death of a child to whom it had been appointed: and see *Reid v. Reid*, 25 B. 469.

In *Archibald v. Wright*, 9 Sim. 161, a testator willed that at the death of his wife 1000*l.* be transferred "to J. G. (a feme sole), for her sole and entire use during her life: that she shall not alienate it, but enjoy the interest of it during her said life, and at her decease

she may dispose of it as she thinks fit." This was held to give a life interest with a testamentary power: the Vice Chancellor considered the restraint on alienation indicative of an intention to prescribe the mode of executing the power, viz., by will, and not by writing *inter vivos*.

In *Doe d. Thorley v. Thorley*, 10 East. 438, there was a "Leave." devise of lands to A. for life, "and also at her disposal afterwards to leave it to whom she pleases." The Court thought that the word "leave" must be taken to apply to that sense of it in which a person making his will would naturally use it, namely, by a testamentary disposition: and held, accordingly, that the power was exerciseable by will only. And see *Paul v. Hewetson*, 2 M. & K. 434.

On the other hand, in *Anon.*, 3 Leon. 71, there was a "Give." devise to A. for life, "and after her decease, she to give the same to whom she would:" this was held well exercised by a grant of the reversion in A.'s lifetime. On this Lord Ellenborough remarks (10 East. 443) that the word "give" might import something of which the party was to divest herself presently.

In *re David*, John. 495, there was a residuary bequest to a feme sole, "to be by her possessed and enjoyed absolutely during the term of her natural life, and to be disposed of as she shall think fit at her death." The Vice-Chancellor said, that there being no such words as "by will," and no indication of an intention to tie up the property, but rather the contrary, he should not be justified in construing the power as testamentary only. The Master of the Rolls (in *Freeland v. Pearson*) remarks, that in the above case the point was not argued, and it is certainly difficult to reconcile the decision with the other authorities. It is to be observed, that the other decision of V.-C. Wood (*re Mortlock*, 3 K. & J. 456) referred to by the Master of the Rolls, in *Freeland*

v. *Pearson*, does not fall under this rule, but under the one stated in s. 7: for the gift is in the first instance absolute, and not limited to a life interest.

If there be no reference to the life tenant's death and no indication of an intention to restrict his absolute dominion over the property, the power will be exerciseable by deed or will.

If there is no reference to any period.

In *Tomlinson v. Dighton*, 1 P. W. 149, the devise was to the testator's wife for life, "and then to be at her disposal, provided it be to any of her children, if living." Here, although the objects of the power were specified, it was held to be expressly directed that it should be at her disposal at any time, and not merely to be at her disposal at her decease.

In *ex parte Williams*, 1 J. & W. 89, the testator gave all his real and personal estate to his wife for her life, "to be by her divided, according to the best of her judgment and discretion, amongst such of his children and issue as should be surviving at the time of her decease." This was held to be a power exerciseable by deed or will.

Indicia of intention not to give absolute interest.

5. Evidence of intention to create a power and not to give an absolute interest will also be afforded by the fact of there being a gift over in default of exercise of the power. (But a mere residuary devise and bequest, if the subject of the power be not specified, will not amount to such a gift over, *re Maxwell*, 24 B. 246.) So, the fact that the power is limited to appointment among a class; or that the donee is a married woman, or otherwise under a disability which the donor cannot remove, is evidence in favour of an intention to create a power and not an absolute interest.

6. If there be a plain reason for the creation of a

power and a life estate in certain events, and an intention that in case such events do not arise the donee's interest shall be absolute, the Court will give effect to such intention.

Where the estate for life is severed from the power of disposing of the reversion for the purpose of introducing other distinct and separate contingent estates, then if such contingent estates do not arise, the donee is presumed, in the absence of other evidence of intention, to be intended to take not a mere life estate with a power of appointment, but absolutely.

Life estate severed from reversion in order to introduce contingent estates.

In *Re Maxwell*, 24 B. 246, there was a gift to A. for life, and after his death to his children, but in default of children, "one-half was to be disposed of as A. should think proper." The Master of the Rolls said that in this case there was a reason for giving the life estate, for the purpose of introducing the subsequent gift to the children, and he held that there being no children, and the son having died without appointing, the fund went to his personal representatives as part of his estate.

In *Goodtitle v. Otway*, 2 Wils., K. B. 6, the devise was to the testator's heir at law for her life, and after her death for her lawful issue, but if she should have no issue, then that she should have power to dispose thereof at her will and pleasure. She died without issue. The Court held that she took an estate in fee-simple by the will, as the contingent remainder to the issue never vested: that the testator, by giving her power to dispose thereof at her will and pleasure in case she had no issue, had given her a fee-simple; and accordingly a will made by her during coverture was held void. And see *Nowlan v. Walsh*, 4 De G. & Sm., 584, where it is said, "When

property is given to a person for life, and after his death to be at his disposal, it is difficult or impossible to give the legatee more than a life interest, because no reason can be suggested for the limitation of a life interest, except that the testator intended to give no more than a power beyond that limitation. But where the will is such that an intention to give a life estate, and an intention to give an estate afterwards may rationally be supposed to co-exist, the same reasoning does not apply." In that case, the testator directed his property to be placed in the funds, and the income to be paid to his wife; after her death he bequeathed two legacies, and the remainder of his property he left at the disposal of his wife if she remained a widow. If she should marry she was to have no control over his property, but the executors were to pay her an annuity for life, and the remainder was in that case given over. The widow did not marry again, and died without executing her power. The property passed to her representatives as part of her estate. And Sug. Pow. 105, 108.

Absolute
gift
followed by
words
sounding
like power.

7. Where there is an absolute gift, followed by words sounding like a power, whether general or limited, with a gift over if it be not exercised, the gift over is repugnant and void; and that, too, whether the subject of the gift be realty or personalty. *Holmes v. Godson*, 8 D. M. & G. 152; *Gulliver v. Vaux*, *ibid.* 167; *Lightburn v. Gill*, 3 Bro., P. C. 250.

This is an offshoot of the general rule of law, that a gift over in the event of the death or intestacy of the person to whom an absolute interest is given, is repugnant and void.

In *Holmes v. Godson*, a testator gave real and personal estate on trust for his son, to vest in him on his attaining 21, but if he should die under 21, or having attained 21, *should not have made a will*, the testator directed the property to be sold, and the proceeds held on other trusts. The gift over was held void. L. J. Turner said that, the law having declared that if a man dies intestate his real estate shall go to his heir, and the personal estate to the next of kin, any disposition which tends to contravene that disposition which the law would make, is against the policy of the law, and therefore void.

In *Gulliver v. Vaux*, a testator devised real estate to his second son in fee, if he attained 21, charged with a legacy to a daughter, and if the second son died under 21, then to the eldest son when he attained 21, charged with the legacy; and in case it should happen that all the testator's three children should die without issue and without appointing the disposal of the estate, then over. The devise over was held repugnant and void.

In *Barton v. Barton*, 3 K. & J. 512, there was a gift to J., T., & M. of all the testator's freehold, leasehold, and other property, share and share alike. As to M.'s share, he declared that she should receive the interest only during her natural life, and that after her death her share should be divided among her children at 21. But if she should have no children, or if they should die under 21, her share was to go to J. & T. "*But in case J. & T. should either or both die intestate, his or their share or shares should be divided between their children respectively, share and share alike.*" The last gift over was held repugnant and void; and see *Hales v. Margerum*, 3 Ves. 299.

In *Re Mortlock*, 3 K. & J. 456, there was a bequest to two persons in two equal parts, each for his and her own sole use and benefit, and to be disposed of as each of them

pleased at their deaths; or if not so disposed of, to be equally divided at their deaths between their children. This was held to be an absolute gift, and the gift over was rejected as repugnant; and see *Re Yalden*, 1 D. M. & G. 53.

If the power be exercise-able by will only.

V.-C. Wood, in *Re Mortlock*, expresses a doubt whether the construction would be the same if the exercise of the power had been required to be by will, or whether the bequest would not be cut down in such a case to a life interest in the donee, with a power to appoint by will.

The case of *Borton v. Borton*, 16 Sim. 552, appears to afford ground for the doubt. In that case the testator gave to B. all his personal estate and effects, the same to be considered as vested in her on her attaining 21, and to be subject to her disposition thereof; and by a subsequent clause he gave the property over, in case B. should die under 21, or without disposing of the property *by her will*. This was held to create a life interest with a testamentary power of disposition. L. J. Turner (8 D. M. & G. 166) considered that this case proceeded entirely on the particular words of the will, the words "to be subject to her disposition thereof" meaning to be subject to her testamentary disposition, and referring to the ulterior power of testamentary disposition given to her. *Sed qu.* In *Hixon v. Oliver*, 13 Ves. 108, there was a bequest to the testator's wife of 60*l.* a year for life, and "300*l.* to be disposed of as she thinks proper, to be paid after her death." This was held an absolute gift, the Lord Chancellor saying that, as a power is a restraint upon property, it is never to be implied. In *Weale v. Ollive* (No. 2), 32 B. 421, the testator, by his will, dated 1840, made an indefinite gift of personalty to a class of children equally, with a declaration that they should have the right to will away their shares on their death, and a gift over, if they should omit to make their wills. The gift over was held

repugnant. The Master of the Rolls said that a right to will is an incident to and belongs to an absolute interest, and cannot be treated as a power. When an absolute interest is given, then the right to dispose of it by will is incidental to that estate, and not a power attached to it.

In *Doe v. Glover*, 1 C. B. 448, there was a devise in fee, and in case the devisee should not have parted with or disposed of the same, then over. The Court seems to have proceeded on the ground that the devise over was not repugnant to, or inconsistent with, the prior devise. The testator's intention was held to be that, unless there was a parting with, or disposition of the estate by deed in the lifetime of the first devisee, the devisees over would take. This case, and that of *Borton v. Borton*, are perhaps of doubtful authority; and in the latter the attention of the Court seems hardly to have been called to the point, that the devise over, as it was construed, took away the testamentary power which was incident to the fee first devised. (See *per L. J. Turner*, 8 D. M. & G. 165-167.)

It seems that there may be some distinction between real and personal property in this respect. It might be regarded as a gift of the real estate, and a direction that if something was omitted to be done before a particular time, the estate should go over (32 B. 425), *sed qu.*

Distinction
between
realty and
personalty,
qu.

In *Doe v. Lewis*, 3 Ad. & Ell. 123, a devise to A., her heirs and assigns for ever, with the intention that she may enjoy the property during her life, and by her will dispose of it as she thinks proper, was held to pass the fee; the additional words being considered as merely explanatory of the devisee's dominion, although the same will contained a devise in fee to another person without the addition of any such words.

But of course a devise to A. *for life*, with remainder to his appointees by deed or will, does not vest property in him, although it gives him an absolute power over it which he

may exercise in his own favour if he pleases. It must also be remembered that a power can co-exist with the fee (*ante*, p. 27), and it is immaterial in what part of a deed powers are inserted, whether before or after estates created. (*R. v. Inhabitants of Ealington*, 4 T. R. 177.)

Hence the addition of a power to an estate is not necessarily void, although it was so decided in *Goodill v. Brigham*, 1 B. & P. 192, where there was a devise to a *feme coverte* in fee, with a power of disposition superadded, and it was held that the power was void as repugnant to the fee; this decision cannot, however, be considered good law. See *Sug. Pow.* 94-98.

What words will amount to an absolute gift.

8. It is frequently a matter of doubt whether an absolute gift is or is not intended by some particular form of words. No general rule can be laid down, as each case must be decided on the evidence of intention to be gathered from the instrument in question. (See *post*, *Powers in the Nature of Trusts*.)

In the following cases the gifts have been held absolute. In *Whiskon v. Clayton*, 1 Leon. 156, under a devise "to the discretion of my father," Gaudy was of opinion that upon these words the father had a fee simple, as, I will that my lands shall be at the disposition of J. S. By these words J. S. hath a fee simple. (*Sug. Pow.* 104.)

In *Lambe v. Eames*, 6 Ch. 597, a testator gave his estate to his widow, to be at her disposal in any way she might think best for the benefit of herself and family. It seems the better opinion that this is an absolute gift. There is nothing in the word "disposal" indicating power rather than property. *Nowlan v. Walsh*, 4 De G. & S. 586.

In *Mackett v. Mackett*, 14 Eq. 51, there was a gift of personal estate to S. for her own purposes, use, and benefit for ever; but not to be subject or liable to the debts, control, or engagements of her present or any future husband; and her receipt alone to be a good and

sufficient discharge for the same. And the proceeds to be applied by her in the bringing up and maintenance of J. M., and all other the children of the said S. This is an absolute gift.

9. The powers and estates of executors, so far as they are relevant, may be here considered. Powers of executors.

If there be a direct devise to them, although for the purpose of selling, they will take an estate, and not a mere power; but if there be no direct gift, but only a direction to sell, a power will be created, and no estate will pass.

A devise of land to executors to sell passes the interest in it, but a devise that executors shall sell the land, or that lands shall be sold by the executors, or a devise of lands to be sold by the executors, gives them only a power. Sug. Pow. 111, 115 (*sed qu.* as to this last, see *Co. Litt.* 113 a).

In *Doe v. Shotter*, 8 Ad. & Ell. 905, there was a devise of freehold to testator's wife for life, and, after her death, &c., "my will is that my said freeholds shall be then sold by my executors in trust, &c." The Court considered that the testator merely devised in substance that the lands should be sold by the executors, and that they, therefore, took nothing more than a mere power.

In *R. v. Wilson*, 9 Jur. N. S. 439, a testator directed his executors to sell copyhold property, and to convey and assure such copyhold hereditaments unto the purchaser or purchasers thereof. It was contended that the direction to convey showed that the executors were intended to take an estate; but the Court held that the will conferred on them a mere power, and that they could accordingly complete a sale without being themselves admitted. Direction to convey.

This case appears to be erroneously reported in 11 W. R. 70. The head-note there is "a *devise* of copyholds on trust to sell;" and in the report it is stated that the testator *bequeathed his copyholds* to his executors, with power to sell and convey. If this report were correct, the decision would be contrary to the rule above stated.

Implied
power in
executors if
no donee
be named,

10. A power effectual to vest the legal estate in the appointee on its execution may be created without express words, and although no donee be named. If no donee be named, the executor is presumed to be intended, unless a contrary intention appears in the will.

If proceeds
of sale are
to be dis-
tributed by
the exe-
cutors,

In *Doe v. Hughes*, 6 Exch. 223, Parke, B., said: "If, from the whole purview of the will, it appears to have been the intention of the testator that his real estate should be sold, and the proceeds are to be distributed for purposes which the executors alone can by law perform, then there is an implied power given to them to sell the estate. The implication that the executors are to take the power arises from the fact, that the money is to pass through their hands, and to be distributed by them in the execution of their office, as in payment of debts and legacies, or it may be otherwise raised by evidence of intention on the face of the will. But it is not enough to show that it would be more expedient to have the sale made by the executors than by the heir-at-law."

In *Bentham v. Wiltshire*, 4 Madd. 44, a testator bequeathed lands to H. B. for life, provided she did not marry, and directed, "after her decease, the estate should be sold" (not saying by whom), and the money divided amongst certain persons named, after paying to

G. B. a legacy of 5*l.*, and he appointed H. B. (the tenant for life) and B. B. his executors. It was held that no power of sale was given to the executors, as they had nothing to do with the produce of the sale, nor any power of distribution with respect to it. There was, too, the further circumstance that the sale was directed to be made after the death of the tenant for life, who was one of the executors; and see *Pit v. Pelham*, Sug. Pow. 116. But see *Ward v. Devon*, mentioned in *Forbes v. Peacock*, 11 Sim. 160; *Curtis v. Fulbrook*, 8 Ha. 25, and S. C. 278-280.

In *Ward v. Devon*, the will was: "Sell all off, both real and personal property, and divide the produce between my wife M. A. W. and my sons and daughters, each to share alike. The law gives the house at Teddington to the youngest son; but it is my will to sell all. I appoint R. W. and my wife M. A. W., my executors." That was the whole will, and the executors were held to take a power to sell. The facts of these two cases (so far as concerns the non-distribution of the produce of the sale by the executors) were the same; and it is difficult to maintain, in the face of *Ward v. Devon*, that the decision in *Bentham v. Wiltshire* was right on the ground stated by the Vice-Chancellor. But in other points the cases are very distinguishable.

Conflict
between
Bentham v.
Wiltshire,
and *Ward*
v. Devon.

In *Ward v. Devon* the sale was immediate, whilst in *Bentham v. Wiltshire* the inconvenience of a sale postponed till the death of the tenant for life, who was also executor—postponed, that is, to a period possibly remote, when all other proceedings in relation to the estate would have been long completed, and the executors would be *functi officio*—must have had some weight (and see Sug. Pow. 119).

It is stated also (11 Sim. 160) that the opinion of Vice-Chancellor (then Mr.) Shadwell, was, that it was

doubtful whether the executors in *Ward v. Devon* could sell. When the intention of testators, as expressed in their wills, is to be the criterion, it is evident that each case must depend on its own circumstances, and it is probable that *Bentham v. Wiltshire*, on all the circumstances of the case, would be decided in the same way at the present day; but the fact that the distribution of the produce of sale was not necessarily entrusted to the executors *virtute officii* would be considered only as one point of evidence, and not as the sole ground of the decision. In neither of the preceding cases was there any devise in fee of the land to be sold. If the land is devised direct to several in fee, with a direction super-added that it should be sold, there would be no implied power of sale in the executors, although the devisees are minors. The evidence of a contrary intention afforded by the devise would be too strong. *Patton v. Randall*, 1 J. & W. 189, 196. But this would not apply to cases where the devise is merely of a life estate, and after the death of the life-tenant to be sold, as in *Bentham v. Wiltshire*.

If there is a devise of lands, a direction to sell gives no power to executors.

Realty and personalty blended into one fund.

In *Tylden v. Hyde*, 2 S. & S. 238, the fact that the produce of the sale of realty and conversion of personalty was treated as blended into one fund, was held sufficient evidence of intention to give the executors the power.

It appears, too, that the subdivision of real estate into shares, with directions for the investment of some of the shares, will give the executors a common law power, if the real estate be not directly devised to any person.

A mere division without more would not probably be enough. The distinction between a devise to A. and B., to be divided between them in equal moieties (in which case A. and B. would take the fee in moieties), and a devise of real estate to be divided between A. and B., or between any number of persons, seems too slight to

found any argument upon; but if such a devise as the last were coupled with directions as to the investment of some of the shares, and other evidence of an intention to convert, it seems that the testator will be considered to have given his executors a common law power to sell the realty.

In *Mower v. Orr*, 7 Ha. 473, the testator prefaced his will with a statement that his property was so scattered about and not realised that he could not tell what he should die worth; he then gave his estate, including copyholds of inheritance, leaseholds, merchandise, money in the funds, and cash, to his children and grandchildren in 20 aliquot shares, and directed two of such shares to be invested in the names of his executors in Government funds for the benefit of two of the legatees, who were infants; the will concluded with a request to his executors, that they would, on his death, use their exertions to get his property together, and divide it according to his intentions therein expressed. The Vice-Chancellor said that the division of the entire property into a number of shares, and the direction contained in the will as to the investment and disposition of some of such shares, precluded the supposition that the testator intended that the copyholds should remain unsold; and he held that the testator had directed a conversion of all his real estate. This implied that the executors took a common law power of sale. The testator had, in fact, directed a sale without saying by whom it was to be made; this (by the rule above stated) would give the executors power to sell, even without the blending of realty and personalty into one fund, and the direction as to the investment in the executor's names.

Sub-division of property into numerous parts and directions as to investment.

On the other hand, in *Cornick v. Pearce*, 7 Ha. 477, the testator gave his real and personal estate to trustees on trust, to apply the rents for his daughters' benefit

until the youngest attained 21; and then to divide the whole into two equal moieties, of which he gave one moiety to his two daughters absolutely, and directed the other to be invested in Government or real securities, and the dividends to be paid to the daughters for life, and on their death the said moneys and effects to be divided amongst their children. The same Vice-Chancellor thought that a mere division of real estate into moieties, and a direction as to the investment of one moiety, did not necessarily operate as a conversion of more than one moiety; the direction to invest arose out of and was rendered necessary by the settlement of the property which the testator had in view; the property was to be enjoyed in specie, and at a certain period there was to be a division of one moiety between the two daughters, the other moiety was to be invested; if the testator had said that one moiety was to be sold for the purposes of investment, the case against the conversion of the other moiety would have been too clear. He thought that there was no direction which required a conversion except as to the moiety to be settled.

It has been said of the case of *Mower v. Orr* (1 Jarm. 3rd ed. 558), that it seems to go little short of deciding that every direction to divide implies also a direction to convert into money, for the purpose of rendering the division more easy. It is, however, to be observed that the will in that case contained a direction for investment, and peculiar expressions, showing an intention to convert, apart from the division into shares, *e.g.*, the recital that the property was *not realized* implying a desire that it should be realized, and the desire that the executors would *get his property together* and divide it.

The question must depend upon the wording of each particular will. If, upon the whole language of the will, for effecting the purposes of the will, it is plain that

there was to be a division of the property; that the property to be so dealt with is to go—not the land in specie, and the money in specie—but to go among certain persons in certain shares and proportions, without any distinction as to land or money; then, if the purposes of the will be best effected by a conversion, and there be no devise, it seems that the executors will take a common law power to effectuate the purposes of the will. *Cf.* the judgment of V.-C. Stuart, in *Greenway v. Greenway*, 29 L. J. Ch. 603; reversed, *ibid.* 605.*

11. A charge of debts by will on real estate gives the executors power to sell the estate, and to give valid discharges for the purchase-money. *Forbes v. Peacock*, 12 Sim. 541, 1 Ph. 717; *Elliott v. Merryman*, 1 W. & T. L. C. 51; *Bailey v. Ekins*, 7 Ves. 319; *Dolton v. Hiven*, 6 Madd. 9; *Stroughill v. Anstey*, 1 D. M. & G. 635.

Implied power of sale in executors by charge of debts.

(As to what amounts to a charge of debts on real estate, see *Silk v. Prime*, 2 W. & T. L. C. 95; a mere general

* By the courtesy of Mr. Dart, I am permitted to insert his opinion on the following case. The will, so far as material, was as follows:—"Fourthly, upon the decease of A., I give, devise, and bequeath all the rest and residue of my real and personal estate, to be divided into four equal shares, between B., C., D., and the children, or survivors of them, of E., namely, F., G., and H., their one-fourth share to be equally divided amongst them, and to be *paid* on their severally attaining their majority; but in reference to C.'s one-fourth share, it is my express will and desire that the same shall be *by my executors invested* in good and proper securities, and that the interest arising therefrom shall be paid to him in quarterly instalments, and in case of the demise of either or any of the above-named parties, the deceased's share to be equally divided amongst the survivors in the respective portions."

Mr. Dart thought that although the mere division into shares would not have been enough to turn what he should otherwise read as a devise into a mere power, yet as there was a direction to *invest* and *pay* in the will, he thought that the executors took *ex officio* a common law power.

direction is usually sufficient). The law on this head has been altered by 22 & 23 Vict. c. 35, see s. 12. The present section applies to cases before that Act came into operation.

This charge of debts affects the equitable but not the legal estate, per Lord Langdale, in *Shaw v. Borrer*, 1 Keen, 576. In that case (which was a suit for specific performance) the testator, after charging his debts on his real estate, devised his advowson of H. to J. K. S. and J. C. and their heirs, on certain trusts for R. W. S., and subject thereto to sell, and he appointed J. K. S., R. W. S., and J. K. S. B. executors. Lord Langdale said that the Court would, in a suit by creditors to which the executors were parties, compel the trustees for special purposes to raise the money requisite for payment of the debts, and that the trustees and executors might themselves do that which the Court would compel them to do, on the application of the creditors; and he held that the executors and trustees together could make a good title.

In *Hodgkinson v. Quinn*, 1 J. & H. 303, V.-C. Wood said: "In suits of specific performance of this kind, where there is a charge of debts, and no distinct provision as to the person by whom the sale is to be made, the executors take an implied power of sale for payment of debts, though the persons beneficially interested are capable of concurring; and where an attempt is made to resist a sale by them, the executors are entitled to insist on a conveyance of the legal estate.

In *Gosling v. Carter*, 1 Coll. 644, the purchaser was held not bound to complete without the concurrence of the heir of the testator.

In *Robinson v. Lowater*, 17 B. 532, 5 D. M. & G. 272, the question at issue was the power of the executor to give a valid receipt for the purchase-money of an estate charged with the payment of debts. The testator in the

case devised three estates, viz., Rutland Place to A. for life with contingent remainders over, Sandfield to B. for life with like remainders over, and Arnold to B. in fee, subject to and charged with the payment of a mortgage of 200*l.* secured on Rutland Place, certain legacies, and his just debts, &c. ; and if Arnold should be insufficient, then he charged Sandfield with the payment thereof, and he appointed B. sole executor. B. sold Sandfield to a purchaser with notice of the will ; the 200*l.* mortgage debt was not paid out of the purchase-money, and the devisees of Rutland Place sought to make Sandfield liable thereto in the hands of the purchaser. The Master of the Rolls and the Lords Justices on appeal held that the testator evidently intended that the executor should sell, and the executor must therefore be considered as invested with all necessary powers, including a power to give receipts. It is to be observed that the question in this case was confined to the executor's power of giving receipts, and was raised by a *cestui que trust*. No question was raised by the purchaser from the executor as to whether he obtained the legal estate.

It has been said that a title depending for its validity on the decision in *Robinson v. Lowater* would not be forced upon an unwilling purchaser. (*Per L. J. Turner* in *Cook v. Dawson*, 30 L. J. Ch. 360.) But see *Alexander v. Mills*, 6 Ch. at p. 131, where it is said that, as a general and almost universal rule, the Court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined.

It has been expressly decided at law that the executors under a power implied by a charge of debts could not convey the legal estate before 22 & 23 Vict. c. 35.

In *Doe d. Jones v. Hughes* (6 Exch. 223), a testator

charged all his real and personal estate with payment of his debts, and died intestate as to one moiety. The Court held that a simple charge of debts did not give a common law power to the executrix to sell for their payment, but that any right the executrix might have must be enforced in equity. See, too, *Kenrick v. Lord Beaucherk* (3 B. & P. 175), *Doe v. Claridge* (6 C. B. 641).

It appears therefore that a simple charge of debts gives the executors an equitable power only, and that on a sale by them the purchaser is entitled to have the legal estate conveyed to him by the person in whom it is outstanding. But see *Greetham v. Colton* (34 B. 615); and in *Eidsforth v. Armstead* (2 K. & J. 334), after a charge of debts, the devise was to the use of trustees during the life of A., and after her death to the use of her appointees by will, and in default of appointment, to the use of her right heirs, and the testator charged his estates with the payment of 700*l*. It was objected that the purchaser did not get the whole legal fee, but the title was forced on the purchaser, the Vice-Chancellor saying that the testator having charged his real estate with a sum of money, must be taken to have given an implied power of sale to some person to raise the sum required, and that the donee must be ascertained from the whole of the will. He does not touch on the difficulty that the purchaser did not get the whole legal fee.

And in *Wrigley v. Sykes* (21 B. 337), where there was, first, a charge of debts; then a devise to trustees for 500 years, and then a devise to five persons in fee as tenants in common, who were also appointed executors, it was held that 33 years after the testator's death the surviving executors could sell, and specific performance was decreed against the purchaser, although it appears that he could not get more than two-fifths of the fee (see this case observed on, Sug. Pow. 121).

As to sales by devisees of lands subject to a charge of debts, see ante, p. 11, and Dart. V. & P. 568.

The fact that a considerable period has elapsed since the testator's death does not affect the validity of the executor's power in equity. In *Sabin v. Heape* (27 B. 553), the testator had been dead for 27 years, and the original executor for seven, but the title on a sale by the executor's executor was forced on the purchaser, and it was held that the vendors were not bound to give evidence of the existence of any debts to show that a sale was necessary. In *Forbes v. Peacock* (1 Ph. 717), 25 years, in *Wrigley v. Sykes* (21 B. 337), 33 years, in *Greetham v. Colton* (34 B. 615), 13 years had elapsed since the testator's death.

Lapse of time does not affect the power.

12. It is now enacted by 22 & 23 Vict. c. 35, s. 14, "Where by any will which shall come into operation after the passing of this act (13 Aug., 1859), the testator shall have charged his real estate or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money as aforesaid, by a sale and absolute disposition by public auction or private contract of the said hereditaments, or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other; and any deed or deeds of mortgage so executed may reserve such rate of interest, and fix such period or periods of repayment as the person or persons executing the same shall think proper.

Devisee in trust may raise money by sale, when.

Power to
extend to
survivors,
&c.

“ S. 15. The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent, or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid.

Executors
to raise
money, &c.,
where no
sufficient
devise.

“ S. 16. If any testator who shall have created such a charge as is described in the 14th section, shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested ; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.”

Implied
power in
executors,
how re-
butted.

13. The implied power of executors over the real estate of the testator arises from the expression of the testator's intention, to be gathered from his will : the implication may therefore be rebutted by other evidence of intention in the will : it is accordingly established that—

Where the direction that the debts shall be paid is coupled with a direction that they shall be paid by the executors, it is assumed that the testator meant that the debts should be paid only out of the property which by law passes

to the executors (*Wasse v. Heslington*, 3 M. & K. 495.)

“When the testator in his will directs that all his just debts and funeral expenses be fully paid by his executor thereafter named, it must be intended that he had then fully determined who that executor should be, and the will is to be construed as if he had said, I direct that my just debts and funeral expenses be fully paid and satisfied by A. B., whom I hereinafter name my executor. In such case, the obligation to pay his debts and funeral expenses would be a condition imposed on A. B., to be satisfied, so far as all the property which he derived under the will would extend, whether personal or real.” *Henvell v. Whitaker*, 3 Russ. 343.

Consequently the rule above stated is subject to this exception, viz., if the will contains a devise in fee of real estate to the executors, then the direction that the debts are to be paid by the executors does not affect the validity of the general charge of debts on the real estate so devised. In *Dover v. Gregory*, 10 Sim. 393, there was a direction that the debts were to be paid by the executor, and then there was a gift to that executor of copyholds by words which would not carry the fee, unless the debts were held to be charged upon it: and it was held that the debts were charged on it, and that the fee consequently passed.

Where lands are devised to the executors,

But a direction that the debts shall be paid by the executor, coupled with a gift to that executor of the real estate expressly for life, will not enable the executor to dispose of the fee.

Life estate only not enough.

In *Cook v. Dawson*, 29 B. 123, the testator directed that his debts, &c., should be paid by his executrix, his wife: he devised all his real estate to her for her life, with a power to mortgage it for her own benefit, and at her decease he gave the property to her nephews and

nieces. The Master of the Rolls said that the direction to pay debts being a direction that they should be paid by the executrix, and there being no devise of the corpus of the estate to the executrix, it could not be considered as a charge of debts upon the corpus, and that she could not make a good title to a purchaser: and it was held on appeal that the title was at least too doubtful to be forced on a purchaser.

Where unequal benefits are given to executors.

Although, when a testator directs payment of his debts by his executor, and devises real estate to that executor, it is considered that the testator has imposed on the executor the duty of paying the debts to the extent of the real estate devised to him, and that property is considered to be charged with debts, it is otherwise when there are two or more executors, to whom unequal benefits are given by the will: because in such a case it cannot be supposed to be the testator's intention that they should be equally subjected to the burden of his debts, and therefore the property given to them is not considered to be charged. *Harris v. Watkins*, Kay, 438. It is the same, if the devise be to one of several executors. *Keeling v. Brown*, 5 Ves. 359.

14. The power, if created, extends to all the testator's lands: for the purchaser is not to be put to his inquiry as to the quantum required to be sold to defray the debts; and the testator is to be presumed to have intended a sale of a sufficient quantity to pay his debts; but

Generality of power over lands, how restrained.

The generality of the implied power of sale given by a charge of debts may be restrained by a subsequent express provision for the payment of those debts. (*Thomas v. Britnell*, 2 Ves. sen. 313; *Douce v. Torrington*, 2 M. & K. 600.)

In *Palmer v. Graves*, 1 Keen, 545, the Master of the

Rolls said : “ The testator commences his will by saying : “ In the first place I direct my just debts, funeral expenses, and the charges of proving this my will to be fully paid.” These words, if not limited or controlled by anything else in the will, are sufficient to constitute a charge on all the real estates for the payment of debts : not a clear express charge on all the testator’s lands, but a charge by implication, capable of being explained by subsequent words or a subsequent provision for the payment of debts. The testator, after employing the words I have stated, proceeds to make several devises and bequests, and then gives and bequeaths unto John Graves a small quantity of silver plate, together with the rents and profits of his freehold and leasehold premises, due and accruing up to what is termed a quarter day, which should ensue next after his decease, *which rents and profits I charge with the payment of my said debts, funeral expenses, and the charges of proving this my will.*” And he held that the general charge was controlled by the specific charge.

15. And the testator who has made a charge of debts may show an intention that the sale should not be made by the executors ; the implication that would have arisen from the charge of debts may be rebutted by express words.

Although there is a general charge of debts, sufficient to give the executors implied authority to pass the legal estate, yet, if there is a devise of the legal estate to a particular person, and the estate is charged with the payment of debts or legacies, the money must be raised through the instrumentality of the devisee, and he is the only person who can make a legal title, and the purchaser is not bound to inquire

When the devisee of real estate, not executor, the person to sell.

(in the absence of special circumstances) whether the money is applied in payment of debts, or whether the sale was intended for that purpose. (*Colyer v. Finch*, 5 H. L. C. 905.)

In *Corser v. Cartwright*, 21 W. R. 938, 8 Ch. 971, the testator directed that his debts should be paid, made several specific devises and bequests, and then devised certain specific estate and all his residuary estate to A., subject nevertheless and chargeable to and with the payment of his debts, &c., and he appointed A. and B. executors. A. mortgaged the specific estate devised to him for his own purposes. The creditors of the testator then filed a bill praying that the mortgagee might hold subject to their claims. But the Lords Justices held that the specific charge explained the implied charge, and that the devisee of the estate subject to the charge was the proper person to sell or mortgage that estate; a devise charged with the payment of debts to A. being in effect the same thing as a devise to A. in trust to pay the debts there-out.

16. As to the powers of executors, with regard both to their creation and to their execution.

Sale by
acting
executors.

Before 21 Hen. 8, c. 4, in cases where testators directed the sale of their lands by their executors, and any of such executors refused to intermeddle with the execution of the will, the acting executors could not sell: but by that statute it was enacted that in such cases all bargains and sales of the said lands made by such of the executors as accept the trust shall be as good as if the refusing executors had joined. And although the letter of the law extends only to cases where executors have a power, yet being a beneficial law it is by construction extended where lands are devised to executors to be sold. (*Co. Litt.* 113 *a.*)

In *Peppercorn v. Wayman* (5 De G. & Sm. 230), the words of the will were: "I direct that the said A. B. C. and D., the executors of this my will, or the survivors or survivor of them, or the executor or administrators of such survivor, shall sell my copyholds." One of the executors died in the testator's lifetime, another never acted: the two others sold, and some time after the sale, the survivor, who had never acted, executed a deed of disclaimer. It was held that the above statute applied to copyholds as well as to freeholds, and that the disclaimer of the other executor related back, so as to take effect *ab initio*, there being nothing to raise any assumption of *mala fides*. 21 H. 8, c. 4, applies to copyholds.

So, a power of appointing new trustees given to A., his executors, administrators, and assigns, may be well exercised by two out of three executors of A., one having renounced. (*Granville v. MacNeile*, 7 Ha. 156.)

17. It is stated, (Co. Litt. 113 a.) that, albeit one executor refuse, yet the acting executor cannot make sale to him that refused, because he is party and privy to the last will, and remains executor still. This is not now law. (See *Mackintosh v. Barber*, 1 Bing. 50., 7 Moore 315.) Executors cannot purchase their testator's estate.

But a continuing executor cannot, either immediately or by means of a trustee, be the purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased. (*Hall v. Hallet*, 1 Cox, 134.) This is involved in the rule of equity that a trustee cannot buy from himself. (*Fox v. Mackreth*, 1 W. & T. L. C. 104.) But a sale by acting executors to one of themselves or to a trustee for one of themselves is good at law. (*Mackintosh v. Barber*.)

18. The power of an executor is not determined by the death of his co-executor, but survives to him. (*Flanders v. Clarke*, 3 Atk. 509.)

Sale by
surviving
executors,
when valid.

But Coke says (Co. Litt. 113 a) : The executors having but a power to sell, they must all join in the sale. Then put the case that one dies : It is regularly true that, being but a bare authority, the survivors cannot sell. But, if a man deviseth his land to A. for a term of life, and that, after his decease, his land shall be sold by his executors generally, and make three or four executors, and during the life of A. one of the executors dieth, and then A. dieth, the other two or three executors may sell, because the land could not be sold before, and the plural number of his executors remain. But if they had been named by their names, as by J. S., J. N., J. D., and J. G., his executors, then in that case the survivors could not sell the same, because the words of the testator could not be satisfied.

But if a man deviseth land to his executors to be sold, and the one dieth, yet the survivor may sell the land ; because, as the state, so the trust shall survive.

Mr. Hargrave, in his note to the above section, contends that where a power of selling is given to executors, or to persons *nominatim in that character*, a surviving executor ought to be able to exercise the power, for, by the death of his co-executors, the whole character of executors becomes vested in the survivor, and the power being annexed to the executors *ratione officii*, and the office itself surviving, the power annexed should also survive. And see *post* (Delegation of Powers, s. 7) ; and Sug. Pow. 128.

Powers of
executor
of executor.

19. In all cases, except of special trust and authority without the office of executorship, the executor of an executor, how far so ever in degree remote, stands as to the points both of being, having and done, in the same plight as the first, and immediate executor. (Williams on Executors, 6th ed. 897.) It is stated by Wentworth (Off. Ex. c. 20, p. 462, 14th ed.) that a special trust recommended to an executor, as to sell land, is not

performable by his executor, and so Lord St. Leonards (Pow. 129) says, that in the absence of clear intention, the representative of an executor cannot exercise a power vested in the executor, and for this he cites a case (19 Henry 8, 9): "If a man declare his will that B. and C., his executors, shall sell his land, and die, and B. dies, and C. makes D. his executor, and dies, and D. sells, this is void, for the trust is strict." It is to be observed that this is not a case of a power given to executors simply, but to persons *nominatim*, who are described as executors; and it would appear reasonable that, if a man directed that his executors should sell his land, this should mean every person who may fill that office; for the power of an executor is founded upon the special confidence and actual appointment of the deceased, and such executor is therefore allowed to transmit that power to another in whom he has equal confidence; and so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator. (Williams on Executors, 244, and Hargrave's note, Co. Litt. 113 a.)

And, moreover, it appears that where the executors take an *implied* power, the executor of an executor may sell, the intent being that the power shall be executed by the person into whose hands the money is to come. (*Forbes v. Peacock*, 11 M. & W. 630, and Sug. Pow. 116, citing 1 Cha. Ca. 178; *Sabin v. Heape*, 27 B. 553.)

Where the power is implied.

The question in each case would be, whether the testator in the particular instance intended to repose a personal confidence in the donee of the power or not. (See *post*, Delegation of Powers.) There is nothing impossible or illegal in allowing a man to repose confidence in persons whom he does not know. (Sug. Pow. 129.) Hence the objection that, although a man might trust his executor whom he does know, he cannot intend to trust

his executor's executor, whom he does not know, is of no weight. (And see as to the distinction between executors and administrators on this ground, Williams on Executors, 244.)

Acts of
executor
before pro-
bate.

20. An executor derives his authority from the will, not from the probate, but the probate is the necessary evidence of his executorial character. Probate, when taken out, relates back to the date of the death. Accordingly it has been held that an act done by an executor before probate is valid, provided the will be ultimately proved, although the executor who did the act died without proving the will. (*Wankford v. Wankford*, Salk. 229.) In *Brazier v. Hudson*, (8 Sim. 67), a term of years was vested in A.; he died, having appointed B. his executrix; she assigned the term to C., and died without proving. It was held that on letters of administration to A. with the will annexed being taken out, the assignment to C. would be established.

Sale of
real estate.

It would seem to follow from this that executors, who have a power to sell real estate, may exercise it before taking out probate, and give a valid title to a purchaser; but in order to complete that title, so as to make it marketable, it must be shown that they were the persons in whom the power was vested, and this can only be done by the production of probate.

And in *Newton v. Metropolitan Railway Co.* (1 Dr. & Sm. 583), where a bill was filed by executors before probate, alleging that the will had not been proved, and praying an injunction to restrain the company from taking or continuing in possession of certain leaseholds contracted to be sold to the company by their testator, the Court held that it was perfectly competent for the plaintiffs to file their bill, alleging the truth as to the probate not having been yet granted, &c., alleging that the company had taken possession, and to apply for an

injunction to restrain them from retaining possession until the purchase-money was paid, even if the grant of probate was still delayed. But it was also held that, although executors can make an assignment, and give a receipt for purchase-money, which are binding; yet a purchaser is not bound to pay the purchase-money until probate, because, till the evidence of title exists, the executors cannot give a complete indemnity.

This would appear to apply to the case of a sale of real estate by executors under an implied power, given to executors as such. In such a case it would appear that a purchaser is entitled, and ought to refuse to complete until probate has been taken out.*

There is a conflict of opinion as to whether a power expressly given by the will to the executors exists in, and can be exercised by executors who renounce. Sir E. V. Williams (*Executors*, 275) thinks not, unless the power is given to them in their proper names, and without reference to their office of executors; and he cites Perkins (548):—"If a man will that A. and B. his executors, shall sell, &c., and they refuse before the Ordinary, yet it seems they may sell, because they are certainly named, so that it appears the

Powers expressly given to executors who renounce.

* By 20 & 21 Vict. c. 77, s. 79, it is enacted that where any person, after the commencement of that Act (25 August, 1857) renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor. And by the 21 & 22 Vict. c. 95, s. 22, whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor. (As to retracting renunciation, see *In the goods of Gill*, L. R. 3 P. & D. 113.)

Equitable
estates.

Legal
estate.

Adminis-
trator
cannot
sell.

will of the testator is that they shall sell whether they refuse or not. But otherwise it shall be (as it seems) if he will that his executors shall sell, without expressing their names, and they all refuse before the Ordinary, they cannot sell." (And see *Yates v. Compton*, 2 P. W. 308.) Lord St. Leonards (Pow. 118) says that they can exercise it; and this seems to have been expressly decided in a case, *temp.* Hen. 7 (Sug. Pow. 893), both as to legal and equitable estates, where it is said, "And if a man has feoffees upon confidence, and makes a will that his executors shall alien his lands, there if the executors renounce administration of the goods, yet they may alien the land, for the will of land is not a testamentary matter, nor have the executors to interfere in this will, except so far as a special power is given to them." "And if a man make his will that his executors shall alien his lands without naming their proper names, if they refuse the administration or to be executors, yet they may alien the land. *Quod fuit concessum per Fineux et Tremaille* for clear law. *Rede non dedit.*"

But the administrator cannot sell if no executors be appointed or if the executors renounce. "And if a man has feoffees in his land, and makes his will that his executors shall sell his land, and then he does not make executors, then the Ordinary shall not meddle with the land, nor the administrators neither, for the Ordinary has only to meddle with testamentary matters as of goods, and consequently no more can the administrator who is but his deputy. And therefore it was lately adjudged in the Exchequer Chamber by all the Judges of England that if a man makes a will of his lands that his executors shall sell the land and alien, &c., if the executors renounce administration and to be executors, then neither the administrators nor the Ordinary can sell or alien, &c. *Quod fuit concessum per Rede et Tremaille* for good law."

The question in all such cases really is, whether the confidence is reposed in the individuals named, or in the persons who *de facto* fill the given office.

It might perhaps be considered that in every case where a testator directs a sale of his lands by his executors, and appoints A. and B. executors, he means that A. and B. shall sell his land; but this would not apply to powers annexed by implication to the office of executor; in such a case, at any rate, it seems that executors who renounce could not exercise it. But it is not so clear as to the powers expressly given to executors: if it is to be regarded as a bare power given to several *nominatim* (a view which is perhaps supported by the necessity for passing 21 Hen. 8, c. 4, before referred to), how can it be exerciseable by the survivors or survivor? That it is so exerciseable, however, is shown by *Howell v. Barnes* (Cro. Car. 382) and *Brassey v. Chalmers* (4 D. M. & G. 528). If, on the other hand, it is annexed to the office (and this seems to have been the ground of the two last-mentioned cases), how can any persons exercise it who renounce the office? Cf. *Keates v. Burton* (14 Ves. 434).

The Probate Acts do not seem to affect the question, except so far as regards powers annexed by implication to the office.

21. As to the creation of powers with reference to their extent.

A power may extend to enable a disposition of the fee, although no words of inheritance are used, if the intention be clear. Extent of power.

The powers of executors to sell their testator's real estates are necessarily co-extensive with the requirements to be fulfilled by such sales. If, therefore, a testator directs that his land be sold, and the produce distributed

among certain persons, his executors will be authorized to sell the whole fee; if the power of sale be raised by charge of debts on the real estate, that also will enable them to dispose of the fee, for it may be requisite in order to carry out the testator's intention of paying his debts, and the purchaser is not bound to inquire to what extent the testator is indebted. (*Spalding v. Shalmer*, 1 Vern. 303.)

But there are other cases in which the intention is not so clear. It may, perhaps, be stated as a general rule, that—

*Prima
facie ex-
tends to
the fee.*

The donee is to be taken to have intended to create a power to pass the whole of his estate and interest, in the absence of all expression to the contrary.

In *Alloway v. Alloway* (4 Dr. & War. 488), Lord St. Leonards says:—"Where the power is created in general terms, and there is nothing on the face of the instrument to control those terms, the Court ought to construe the power as enabling the donee to appoint a fee simple estate, and it ought not to require the expressions 'manner and form,' or 'shares and proportions' for the purpose of spelling out the intention of the donor, but should adopt the plain rule that, where the general scope of the power is not inconsistent with such a construction, the donee may appoint the absolute interest, whether in cases of real or personal estate;" and see *Tomlinson v. Dighton* (1 P. W. 149). In *Bradley v. Cartwright* (L. R. 2 C. P. 511), the power which was contained in a will before the Wills Act authorized the donee to appoint to all and every the issue, child or children of his body, in such shares and proportions, manner and form, as he should think fit. The Court

(p. 522) considered that this would entitle the donee to appoint to the children in fee. In *Doe d. Chadwick v. Jackson* (1 Moo. & Rob. 553), a deed to lead the uses of a fine to effect partition between coparceners and their husbands, limited one share, after life estates to the husband and wife, "to the use of the child and children for ever, subject nevertheless to such directions, orders, and appointments" as the husband should appoint. This was held to be a power to appoint the fee.

Since the Wills Act, words of inheritance would not be necessary to create by will a power to dispose of the fee; and even before that Act, a power given by will to appoint an estate to particular objects authorized the limitation of the fee, although no words of inheritance were used. In *Saltonhall's case* (2 Lev. 104, *sub. nom. Lief v. Saltingstone*, 1 Mod. 189), a man devised lands to his wife for life, and "that she might dispose thereof to anyone of her children she pleases." On a second hearing it was held by three judges against one that this enabled a disposition of the fee. In *R. v. Marquis of Stafford* (7 East, 521), a testator gave a power to A. to appoint an estate "to the use and behoof of the lawful issue of the body of A., in such parts, shares, and proportions, manner and form as A. should by deed or will direct." This was held to give a power to appoint the fee. In *Crozier v. Crozier* (3 Dru. & War. 353, 383), the words, "from and after the decease of A., I devise the same unto the issue male and female of A.," in such shares and proportions as A. should by will appoint, were considered by Lord St. Leonards to authorize an appointment of the fee.

Power in
favour of
particular
object
before
Wills Act.

It has been said that a power to appoint to such persons merely as A. shall choose, enables only the appointment of life estates; but if it be to such uses, or for such estates, this will extend to an appointment of the fee. This distinction cannot exist with regard to

Powers
created by
will since
the Act.

wills coming into operation after the Wills Act; for, as a general devise without words of inheritance will now pass the fee, it may well be held to give the power over the fee to the person in whom a power of appointing the property is vested, although the power itself does not contain words of inheritance, or words equivalent to them (Sug. Pow. 400); and it is submitted that the rule above stated, and Lord St. Leonards' opinion in *Alloway v. Alloway*, are more in accordance with principle even in cases of wills before the Act and of deeds. In *Kenworthy v. Bate* (6 Ves. 793), estates were limited by settlement to the use of B. P. for life, remainder to the use of P. for life, remainder to the use of such child or children of the marriage as B. P. should appoint. No doubt was raised as to whether this admitted of an appointment of the whole fee. In *Strutt v. Braithwaite* (5 De G. & Sm. 369), hereditaments were vested in trustees by a marriage settlement on trust for husband and wife successively for life, and after certain trusts (which did not take effect) for the children as the husband and wife should appoint, on trust in default of appointment, "to convey all the same premises unto and amongst such children equally." The Vice-Chancellor held the children took estates in fee. The conveyance to the trustees was in fee, and in a marriage settlement for the benefit of children, a direction to convey to them must mean to convey to them in fee.

Powers
created by
reference.

22. Powers created by reference to other powers, will be taken to be of the same extent and nature as such other powers, having regard to any change of donee, object, or circumstance. If there be any contingency or restriction personal to the donee of the power to which reference is made, such contingency or restriction will not be attached to the created power (*Harrington v. Harrington*, L. R. 3 H. of L. 295); and if the original

power is inconsistent with limitations and conditions to be attached to the new power, the latter will be made to conform to the intention displayed by such limitations. Thus, in *Crossman v. Bevan* (27 B. 502), a testator directed that if his daughter A. should marry, she and her husband should have a similar control over the portion he provided for her in that event as his daughter B. had by her marriage articles. But if A. should marry and die without issue, the fund was, after the death of herself and her husband, to revert to the testator's surviving children, or, in case of their death, to their nearest relatives. B.'s articles, after the usual powers of appointment among children, and gift to them in default of appointment, gave her a general power of appointment in case there should be no children. This general power was held to be negated in A.'s case by the ultimate limitation. (And see *post*, Powers of Charging, and cf. *Earle v. Barker*, 11 H. L. C. 280.)

And the implication of an intention to create or keep in existence a power by reference may be rebutted by other evidence of intention.

In *Lord Shrewsbury v. Keightley* (19 C. B. N. S. 606), a private Act of Parliament by which estates were settled on the issue of the settlor as they should succeed to the earldom, contained powers for each tenant for life or in tail to lease all or any part of the lands for three lives, or for twenty-one years, or for a term of years determinable on three lives, so as there should be reserved and made payable by every such lease the usual and accustomed yearly rents, boons, and services, with a proviso of re-entry for non-payment.

By a subsequent Act, part of these estates were conveyed to trustees, freed, &c., of all uses, powers, &c., in trust to sell and convey to purchasers: but it was provided that until such sale, the estates should be held,

possessed, and enjoyed, and the rents, issues, and profits thereof had, received, and taken by, and be applied to, and for the benefit of, such person and persons as would have been entitled thereto if the Act had not been passed.

This proviso was held not to extend so as to keep alive the original power of leasing: the Court thought that it would be defeating the object of the settlement to allow a tenant for life to lease for 99 years, determinable on lives, at a nominal rent, and taking a fine; for the best and most improved rent was not required to be reserved.

General powers not to be restricted in executed instrument.

23. A power expressly created in general terms by an executed instrument is not to be cut down, except by express words.

Therefore if there is, first, a general power of appointment given, and then a limited power in default of appointment under the general power, the general power is not to be cut down, although the deed creating the power be a marriage settlement, and its natural object (of providing for the wife and children) will be defeated. *Minton v. Kirwood* (3 Ch. 614); and cf. *Lord Cardigan v. Armitage* (2 B. & C. 197); *Harrison v. Symons* (14 W. R. 959).

In *Peover v. Hassell* (1 J. & H. 341), the settlement in question (which contained no special recitals) conveyed real estate of the wife to her for life (not for her separate use), remainder to trustees to preserve, remainder (in case of forfeiture) to the trustees in trust for the wife for her separate use, remainder to the husband for life, and after the decease of the survivor, "if there should be any children or issue living of the said then intended coverture, to the use of such person and persons for such estate and estates, interest and interests, and to and for such ends,

intents, and purposes, and upon such trusts, and charged and chargeable in such manner, and subject to such powers of revocation, &c., as the husband shall by deed or will appoint;" and in default of appointment, to the use of the children of the marriage in tail, and in default of such issue, according to the general appointment (in the same terms as above) of the wife, and in default of such appointment to the heirs of the wife. The Vice-Chancellor, after reviewing all the authorities, decided that the settlement must be upheld; he distinguished *Bristow v. Warde*, on the ground of the articles there being executory, and on the use of the words "in such manner" there; and he relied on the large terms of the power in the settlement before him, saying that if he cut down the power in that case, he must hold that there was no case in which such a power could be inserted in a marriage settlement.

In *Wood v. Wood* (10 Eq. 220), funds and leaseholds were vested by ante-nuptial settlement in trustees on trust for such person as M. S., a feme sole, should generally appoint, and in default of appointment, for M. S. for life for her separate use; and after her decease, for any future husband her surviving, for life; and after his decease, in trust for all the children of any marriage of M. S., as she by deed or will should appoint, and in default of such appointment, for her children, as therein mentioned. M. S. married in 1867, and by deed-poll, in 1869, purported to exercise her general power by appointing to her husband and herself as joint tenants. The Master of the Rolls held that there had been a valid exercise of the general power. And see *Meade-King v. Warren* (32 Beav. 111); and *contra*, *Gould v. Gould* (2 Jur. N. S. 484).

So, too, a power in a marriage settlement of charging certain sums in certain events must take effect when those events happen, and cannot be limited, controlled,

Power of
charging.

or questioned in any degree, on the ground that under different states of circumstances different results would be arrived at. (*Knapp v. Knapp*, 12 Eq. 238.)

Executory
instru-
ments.

But if the instrument be executory, the Court, applying its rules with reference to such instruments, may interfere to give effect to the intention of the instrument.

In *Bristow v. Warde* (2 Ves. Jun. 336), money was limited by marriage articles to the husband during the joint lives of himself and his wife; and if he should die first, leaving issue, to her for life; and after her decease, *in such manner as the husband should appoint; and in default of appointment, to the issue equally at 21, with an allowance for maintenance and education.* The greater part of the fund was laid out in the purchase of land, which was settled under the direction of the Court in manner purporting to be in execution of the articles: this settlement gave the husband a special, not a general, power of appointment. The husband appointed under the power given by the articles, so as to make it necessary to decide whether that power was general or special. Lord Rosslyn said, "It is clear upon the articles he had no more power under them than what he took to himself under the settlement executed with regard to the bulk of the money. The articles were made to secure a provision for the intended wife and the issue of the marriage; the power of appointment is not indefinite, but is confined to the issue." And see *Mildmay's Case* (1 Co. Rep. 175); *Cook v. Briscoe* (1 Dr. & Walsh, 596), *Swift v. Swift* (8 Sim. 168), and *Sug. Pow.* 439.

In *Tasker v. Small* (6 Sim. 625; 3 M. & C. 63), marriage articles recited an agreement by A. the husband to settle lands to certain uses, subject to raising £15,000

for A.'s benefit by *mortgage or otherwise*; and A. covenanted that he would settle the lands accordingly, subject to raising the said sum *by mortgage, annuity, or otherwise, and to any deed for securing the repayment thereof and interest*; this was held to authorize a sale. The Vice-Chancellor said it would be too much to say that the power was to be cut down, because there was a foolish reference to the deeds by which the raising of the £15,000 was to be effected.

It may be observed that the ordinary covenant to surrender copyholds in a settlement to the uses declared of the freeholds is not executory in the same sense as marriage articles and other agreements resting *in fieri*. (*Minton v. Kirwood*, 3 Ch. 614.)

Powers created by will depend on the intention of the testator, to be collected from the will; but the principle, that general powers expressly given are not to be cut down, unless the intention is perfectly clear, applies *à fortiori*, for there is no inference in favour of children in wills.

Powers
created by
will.

In *Re Jeffery's Trusts*, 14 Eq. 136, a testator gave his residuary estate to A. for life, and after her death among her children, grandchildren, or other issue, as she should appoint, and in default of such appointment as she should generally appoint, and in default of such appointment, over. A., after reciting that she had no children, purported to exercise the general power. She afterwards had children, but died without revoking the appointment. V.-C. Malins considered that the general power could not, and was not intended to be exercised except in the event of there being no issue of A. This decision therefore rests on the double ground of the intention both of donor and donee of the power.

In *Mackinley v. Sison*, 8 Sim. 561, a testator gave his daughter a life interest in funds, with remainder to such persons as she should by deed or will appoint, and in

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default of appointment, to her children, and in default of children, over. This general power was held valid, and not to be restricted by the subsequent gift to children in default of its exercise.

Limited powers will not control general gift, *semble*.

It would appear, too, that the fact that a person has a limited power of appointment will not control the generality of words of limitation under which he takes an absolute estate in default of the exercise of such power. In *Barrymore v. Ellis*, 8 Sim. 1, an annuity was assigned to trustees on trust to pay the same to such persons as A., a married woman, should, notwithstanding coverture, appoint, but so as not to deprive herself of the benefit thereof by sale or other anticipation; and for want of such appointment, on trust to pay the same to A. for her separate use. It was held that A. had both a restricted power of appointment and the general uncontrolled dominion over the property.

In *Brown v. Bamford*, 11 Sim. 127, 1 Ph. 620, stock was bequeathed to trustees in trust, during the life of a married woman, to pay the dividends when and as they became due, but not by way of anticipation, to her appointees; and in default of appointment, *into her proper hands*, for her separate use, and her receipts were to be sufficient discharges. In this case the Lord Chancellor reversed the Vice-Chancellor's decision, and held that the restraint on anticipation extended to the whole gift. But he stated, apparently with approval, the principle of *Barrymore v. Ellis* to be that where a limited power of appointment is created, and in default of the execution of such power, the estate is given generally to the same person, it is competent to the donee to dispose of the estate without regard to the power, the execution of which he is at liberty to waive or abandon. (See, however, *Prideaux*, ii. 157 (6th ed.); *Davidson*, iii. 66; *Harnett v. Macdougall*, 8 B. 187; *Moore v. Moore*, 1 Coll. 55.)

The intention in each case should prevail: in *Barrymore v. Ellis* this would seem to have been disregarded: for the restraint on anticipation is utterly nugatory, unless it apply to the whole gift.

24. If a power of sale, jointure, or the like already exists, and a second similar power is conferred on the same donee, it is in each case a question of intention whether the second power is intended to be additional or substitutional.

Powers additional or substitutional,

If both powers are given to the same person for the same object, and are a double burden upon the property subjected to them, the presumption will be in favour of substitution.

If the power is burdened some,

In *Wigsell v. Smith*, 1 S. & S. 321, 5 Russ. 299, a settlement after limiting two estates to A. for life, with remainder to his sons in tail, with remainder to M. for life, with remainders over, required each person when in possession to assume the name and arms of the settlor, gave the tenants for life powers of leasing and charging the estates with a jointure of £400 per annum and a sum of £2000 for younger children, and reserved to the settlor a power of revocation and new appointment as to one estate. This power was exercised by revoking, as to one estate, the remainder to M. for life and the limitations over; and by appointing that estate to S. for life, with remainders over; and by giving to A. and S., when entitled as tenants for life in possession, "under the limitations aforesaid," powers of charging the estate with a jointure of £400 per annum, and with £3000 for younger children, subject to a direction that there should never be more than the yearly sum of £400 per annum payable out of any part of the premises as a jointure at one time, and directed the assumption of the appointor's name and arms as in the former deed.

In the first place, A. never could be in possession

“under the limitations aforesaid,” *i.e.*, of the second appointment, for he was in by the first appointment; and even if it were not so, the insertion of the power was, as regards A., a mere repetition of that in the former settlement, and the whole scope of the deed showed the intention that it should be substitutional, and the two clauses which were repeated, as well as the charging clauses, were the name and arms’ clause and the leasing powers, neither of which could be cumulative. On the whole scope of the instrument it was clear that the intention was not to give an additional power.

If power is
adminis-
trative.

But the presumption will not arise, if the powers do not constitute a burden; and in favour of the general intention of a deed, the evidence afforded by a recital may be disregarded.

In *Boyd v. Petrie*, 7 Ch. 385, a mortgage containing the usual power of sale was transferred by a deed which recited the mortgage, and that “the power of sale had not been and was not intended to be exercised;” the assignment was of the moneys and “all powers and remedies for recovering the same respectively,” and all benefit of the said several indentures of mortgage, and of every covenant and security therein respectively contained. The mortgaged estates were also conveyed, and the deed contained a distinct and independent power of sale. The Lords Justices held that this second power was additional.

And, *à fortiori*, if the power is created by way of reference to another power, the inference will be against reduplication of charges. *Hindle v. Taylor*, 5 D. M. & G. 577, and *Cooper v. Macdonald*, 16 Eq. 258—“It is not a reasonable way of reading a trust, created by reference to other trusts, to consider everything as there repeated, and so to make it a duplication as it were of trusts in the nature of charges.”

25. The object may be of any nature, provided the rules of Law or Equity are not thereby transgressed.

It may be to revoke either wholly or in part the limitations made by the settlement; (but whether the power extends to the whole or only to a part will depend on the intention appearing on the particular settlement: *Freke v. Lord Barrington*, 3 Bro. C. C. 274); or to raise concurrent interests for different purposes. The ordinary powers in a settlement to jointure a wife, and to create a term for securing a portion for younger children are instances of this.

Object of power.

But it must not be illegal. If therefore the power transgress the laws against perpetuity, it will be void.

Must not be illegal.

In *Duke of Marlborough v. Lord Godolphin*, 1 Eden, 404, a testator devised his real estates to several persons for life, with remainders to their first and other sons in tail male successively, and he empowered and directed his trustees, on the birth of every son of each tenant for life, to revoke the uses thereinbefore limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male. This power was held void as tending to a perpetuity.

In *Ferrand v. Wilson*, 4 Ha. 344, there was a devise to the executors for 21 years, and subject thereto to two successive tenants for life, with the usual limitations to preserve contingent remainders and successive remainders in tail to the children of the second tenant for life, with remainders over. The trusts of the term were to fell timber and apply the proceeds and the rents of the real estates until all the testator's debts and pecuniary legacies were paid. The will contained a power to the executors as well during as after the term, until a tenant in tail or

in fee attained 21, to fell timber and invest the proceeds (subject to the trusts of the term) in the purchase of other estates to be settled to the same uses. V.-C. Wigram decided that whether the trust was imperative or permissive, and whether the timber was to be regarded as part of the annual rents and profits of the estate or not, the power was void, inasmuch as its object was to receive and invest the annual rents and profits (if they were to be regarded as such) until a tenant in tail should attain 21; an event which might not occur for ages, perhaps never; or (if the timber was to be regarded as part of the inheritance) yet the distinction between it and the rest of the inheritance was to be borne in mind, for timber is always alienable during the infancy of a tenant in tail, although the corpus of the estate is not.

It is, however, difficult to reconcile this decision with the remarks of the L. J. Knight-Bruce in *Briggs v. Earl of Oxford*, 1 D. M. & G. 363: in that case estates were vested in trustees on trust to raise money to discharge incumbrances, and subject thereto, to two persons successively for life, with remainder to the sons of the second tenant for life in tail male, with remainders over in fee. The power was for the trustees to cut timber so long as any mortgage debt remained, and to apply the proceeds in discharge of incumbrances. L. J. Knight-Bruce said: "The circumstance of the power being liable to destruction by the tenant in tail is of itself sufficient to preclude all objection, at least to a power of this description, on the ground of perpetuity." It is true that there was also the fact that the power amounted to a contract that the enjoyment of the estate should be limited to a certain extent until the payment off of certain charges, and that the person in possession had only to pay off the charges, and there was an end of the power. But the Lord Justice's words are express as to the sufficiency of the existence of an estate

tail, to prevent the flaw of perpetuity. In this respect the case is identical with *Ferrand v. Wilson*. Moreover (notwithstanding any doubts that Lord Eldon's remarks in *Ware v. Polhill*, 11 Ves. 257, may have suggested), it is well settled that an unlimited collateral power of sale in a settlement by which estates tail are created, is good; for any of the tenants in tail can, by a disentailing assurance, destroy the power so created. (*Biddle v. Perkins*, 4 Sim. 135; *Waring v. Coventry*, 1 M. & K. 249, 252, *n.*)

Unlimited
power of
sale.

The same reasoning applies to all other powers of a like nature, including that in *Ferrand v. Wilson*; it would appear, therefore, that the conclusion ought to be the same in all cases.

And these powers are moreover valid, whether the remainder to which they are collateral is in fee or in tail. The true limit is pointed out by the intent of the settlement: when the purposes of the settlement are spent, the power is no longer capable of being exercised; and this is so, of whatever nature the power may be, whether of sale, exchange, partition, enfranchisement, leasing, or otherwise.

The object
of the
settlement
is the true
limit.

As soon as the fee vests in possession, whether it be by estates tail being barred or otherwise, the powers are determined.

In *Lantsbery v. Collier*, 2 K. & J. 709, 720, V.-C. Wood says: "Whether the remainder in fee of the estate to which the power is collateral is limited so as to depend upon estates tail (in which case the power is upheld, as in *Waring v. Coventry*, upon the ground that it can be defeated by any tenant in tail), or whether that remainder in fee or reversion in fee is limited in some other manner, and so as not to depend by way of remainder on an estate tail (*Boyce v. Hanning*, 2 C. & J. 334, in which case, whenever that estate in fee vests in possession, the whole object and purpose of the settlement is at an end, and the

power ceases), in either case, the power, although not in terms restrained to lives in being and 21 years afterwards, is a valid power, and is not affected by the rule against perpetuities." (*Cole v. Sewell*, 4 Dru. & War. 1, 32; *Wallis v. Freestone*, 10 Sim. 225; Sug. Pow. 848.)

It is the custom of conveyancers expressly to restrict the exercise of powers of sale within the limits of the rule against perpetuities, although powers of leasing are not in general expressly so confined. Davidson, Convey. iii. 469.

Power
annexed to
a term of
years.

But if the power is annexed to a long term of years, which overrides everything and cannot be barred, it will be otherwise. Where estates were assured to the use of trustees for 500 years, and subject thereto, to the use of A. for life, with remainder to his first and other sons in tail, with remainder to B. for life, with remainder to his first and other sons in tail, with divers remainders over, a power to the trustees to enter and manage the estates during the minority of any person who should from time to time be entitled under the limitations of the settlement to the immediate freehold as tenant for life or in tail, was held void for remoteness. (*Floyer v. Bankes*, 8 Eq. 115.)

Power to
arise on
general
failure of
issue in a
deed.

And a power to charge, which is only to arise after a general failure of issue, who do not inherit under the limitations of the instrument creating the power, is bad for remoteness.

In *Bristow v. Boothby*, 2 S. & S. 465, a marriage settlement, after successive life estates to husband and wife, limited the estates to the sons in tail male, with remainder to the daughters in tail general, with remainder to the survivor of husband and wife in fee; and gave power to the wife, if the husband survived her, and all the children of the marriage died without issue, to charge the estate. There was no limitation to the daughters of sons; a son

might have died under 21, leaving a daughter, in which case the power could not have been barred, nor would it be exerciseable until a general failure of issue; it was therefore bad. The authority of this case has been doubted. *Eno v. Eno*, 6 Ha. at p. 179. It is to be observed, however, that the instrument on which the question arose was a deed; but *quære* whether the issue, in default of whom the power was to arise, should not by reference have been construed to mean such issue as was before specified. As to this, cf. *Baker v. Tucker*, 3 H. L. C. 106; *Parker v. Tootal*, 11 H. L. C. 143.

Before the Wills Act (s. 29), the term "die without issue," or the like, pointed to an indefinite failure of issue. Consequently, in wills coming into operation before the Act, a power to arise on the indefinite failure of issue would be bad for remoteness, unless it were subsequent to and barrable with an estate tail.

In a will
before the
Wills Act.

In *Case v. Drosier*, 5 M. & C. 247, a testator created a term of 500 years, and subject thereto devised estate A. to Thomas for life, with remainder to his sons in tail male, with remainder to his daughters in tail general, with remainder to Philip, with similar limitations; and he devised another estate in the same way, only putting Philip before Thomas. The trusts of the 500 years' term were, in case either Thomas or Philip should die without issue, whereby the survivor would become entitled to all his estates comprised in the said term, the trustees should have power to raise £2000 for each of his granddaughters. This trust or power being annexed to a term antecedent to the estate tail, and being therefore not barrable, was held bad. This case was followed in *Sykes v. Sykes*, 13 Eq. 56.

By s. 29 of the Wills Act, the term "die without issue," or the like, is restricted *primâ facie* to a failure of issue at the death.

Where
some of the
objects are
not within
the due
limits.

But a power is not bad for remoteness, because some of the objects thereof are not within the limits allowed by law; for those may be selected to whom a valid appointment in this respect may be made. (*Attenborough v. Attenborough*, 1 K. & J. 296; *Hockley v. Mawbey*, 1 Ves. 150.) It would be otherwise if the power did not authorize an exclusive appointment; in such a case the appointment must necessarily include objects without the limits, and the whole power would consequently be bad.

CHAPTER IV.

OF THE PERSONS BY WHOM POWERS MAY BE EXECUTED.

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1. Every person who is capable of disposing of an estate actually vested in himself, may exercise a power over land (Sug. Pow. 153). In like manner, every such person may exercise powers affecting personalty; the execution of the power being in effect a direction to the trustees, in whom the personalty is vested, to hold it for the appointee's benefit; the execution of a common law power or a power under the Statute of Uses operates so as to vest the land subject to it, without more, in the appointee.

2. In addition to the persons above-mentioned, a *feme covert* can execute a power, whether it be simply collateral, or relating to the land (*Lady Travel's Case*, cited 3 Atk. 711; *Peacock v. Monk*, 2 Ves. sen. 191); and her husband's concurrence is not necessary. *D. d. Blomfield v. Eyre*, 5 C. B. 713). This being the state of the law before 3 & 4 Wm. 4, c. 74, it is clear that her execution

Married women.

Acknowledgment by her, and her husband's concurrence, unnecessary.

need not be acknowledged by her under that statute: it is expressly provided (s. 78) that the powers of disposition given by that Act shall not interfere with any powers she had before the Act.

In *Wright v. Lord Cadogan*, 2 Eden, 239, the Lord Chancellor said: "It has throughout the case been admitted that a woman may now, antecedent to her marriage, retain a power over a legal estate of which she is seised, so as to have during coverture a power to dispose of it (which is done by complying with the requisites) in the same manner as she might have done if she had not put herself under coverture." As to appointments by her to her husband, see *ante*, p. 7, and Co. Litt. 112 a, n. 6.

Over
personalty.

A married woman may also exercise a power over personalty, whether it be in possession or reversion; and if it be the latter, her execution need not be acknowledged under Malins' Act, 20 & 21 Vict. c. 57.

Release of
powers
over land.

By 3 & 4 Wm. 4, c. 74, s. 77, it is (amongst other things) enacted that, after the 31st December, 1833, a married woman may release or extinguish any power which may be vested in or limited or reserved to her, in regard to any lands of any tenure or any money subject to be invested in the purchase of lands, by deed acknowledged in manner provided by the Act, with her husband's concurrence.

Over per-
sonalty.

By 20 & 21 Vict. c. 57, it is enacted that after 31st December, 1857, it shall be lawful for every married woman to dispose by deed of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate to which she shall be entitled under any instrument made after the said 31st December, 1857 (except her marriage settlement), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could

do if she were a *feme sole*, and also to release and extinguish her equity to a settlement out of any personal estate to which she or her husband in her right may be entitled under any such instrument as aforesaid. But every such deed must be acknowledged in the same manner as deeds under 3 & 4 Wm. 4, c. 77, and the husband must concur; and the section does not apply to cases where the married woman is restrained from anticipation.

As to powers of attorney by married women, see *post*, "Powers of Attorney."

3. It makes no difference that the power is given to the wife, when she is married to A., and that she survives A. and marries B.; she may exercise it during her second coverture, or during her widowhood: in like manner she may exercise it, although it be given to her when she is unmarried, and she afterwards marries.

May execute power during second coverture.

In *Burnet v. Mann*, 1 Ves. sen. 156, the power was to the husband and wife and the survivor of them: the wife survived and married again: an appointment by her, during her second coverture, was upheld.

4. But a power may be restrained by the terms of the instrument creating it—*e.g.*, a power to be executed by A. "while sole," cannot be exercised by A. while covert.

Unless restrained in terms.

In *Horseman v. Abbey*, 1 J. & W. 381, the trustees of a marriage settlement were directed to raise £1000 on the death of the survivor of husband and wife, in case there should be no issue of the marriage living at her death; and to pay the same "as the wife at any time or times during her coverture, and notwithstanding the same," by any deed should appoint. This power was held to be exerciseable during that particular coverture only; and see *Morris v. Howes*, 4 Ha. 599; *Burnham v. Bennett*, 2 Coll. 260; *Holliday v. Overton*, 14 B. 467.

And a power which has no existence, except in the event of the death of the wife while covert, cannot be

exercised by her at all if she survive her husband. (*Noble v. Willock*, 8 Ch. 778, *post*, ch. 5, s. 13.)

Or by im-
plication.

It has been held that a general power reserved to a single woman in a settlement made by herself was not exerciseable during coverture by implication from the limitations in default of appointment (*Gould v. Gould*, 2 Jur. N. S. 484); but the case seems of doubtful authority; Lord St. Leonards disapproves of it (Pow. 155); and in *Wood v. Wood*, 10 Eq. 220, the Master of the Rolls declined to follow it. In the last-mentioned case a *feme sole* settled her property some months previously to her marriage by deed to which her future husband was not a party, on trust for such persons as she should by deed or will appoint, and in default of appointment, for herself for life for her separate use, and after her death without having exercised such power of appointment, for any future husband her surviving for life; and after his decease, for the children of the marriage as she should appoint, and in default of appointment for the children: the settlement contained a provision that her after-acquired property should be subject to the same trusts. It was contended that this last provision was inconsistent with the contention that the power was exerciseable during coverture; but the Master of the Rolls thought that it might be exercised at any time; and see *ante*, ch. 3, s. 23.

A power to be exercised "notwithstanding coverture" may be exercised at any time. (*D. v. Bird*, 5 B. & Ad. 695.)

Court of
Chancery
the forum
to decide
whether
married
woman's
will is an
exercise of
a power or
not.

5. The Court of Chancery is the proper forum for deciding whether a married woman's will is an execution of a power, and therefore operative or not. The principle upon which the Court of Probate acts in granting probate to wills of married women, is stated in *Paglar v. Tongue*, L. R. 1 P. & D. 158. When the Court is satisfied that a *bonâ fide* question as to the existence of a power, enabling

a married woman to make a will, is intended to or may be raised, it will grant a limited probate of such will, to enable the question as to the existence of the power to be determined by the Court of Chancery; and see *Tatnall v. Hankey*, 2 Moo. P. C. 342. But if there be a power of appointment by will given to a person, any instrument admitted to probate as a will must be taken to be one by the Court of Chancery. (*Douglas v. Cooper*, 3 M. & K. 378, and *D'Huart v. Harkness*, 34 B. 324, *post*, ch. 5, s. 21.)

6. It may here be added that a *feme covert*, when not restrained from alienation, has in equity the same *jus disponendi* over her separate estate, both real and personal, by deed or by will as she would have if free from the disability of coverture. And not the less so, because a specific power of appointment, in a particular way, over the property, is given her by the instrument settling the property to her separate use. (*Taylor v. Meads*, 13 W. R. 394, 34 L. J. (Ch.) 203, 4 D. J. & S. 597.) In that case Lord Westbury says: "With respect to separate property, the *feme covert* is, by the form of trust, released and freed from the fetters and disabilities of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris*, the common law attaches a right of alienation; and accordingly the right of a *feme covert* to dispose of her separate estate was recognized and admitted from the beginning, until Lord Thurlow devised the clause against anticipation. But it would be contrary to the whole principle of the doctrine of separate use to require consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of; that would be to make her subject to his control and interference. The whole lies between a married woman and her trustees, and the true theory of her alienation is, that any instrument, be it deed or

Extent of
jus dis-
ponendi.

writing, when signed by her, operates as a direction to the trustees, to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the *feme covert's* equitable interest; and when the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity;" and see *Chartered Bank, &c. v. Lem-prière*, L. R. 4 P. C. 572; *Noble v. Willock*, 8 Ch. 778. If the estate be not settled to the separate use of the wife, equity follows the law, and gives her no power of disposition over it by will, and only such a power by act *inter vivos* as she would have if her estate were legal—*i.e.*, her disposition must be by deed acknowledged under the statute; and as to reversionary interests in personalty, see *Hanchett v. Briscoe*, 22 B. 496; and 20 & 21 Vict. c. 57.

Corpus of real estate may be held to separate use.

The corpus of real estate may therefore be settled to the separate use of a married woman, if the intention be clear. In *Taylor v. Meads*, 4 D. J. & S. 597, land was conveyed to trustees in fee (in default of a power of appointment, which was not executed) upon trust for E. M., her heirs, and assigns; and the testator declared that E. M.'s estate should be for her separate use. This gave her a separate estate in the corpus. This is contrary, however, to former opinions. In *Hoare v. Osborne*, 12 W. R. 661, V.-C. Kindersley says: "The fee simple of real estate, it was not disputed, could not be settled to the separate use of a married woman, although by her will she might dispose of it as if she were a *feme sole*." And even now there must be a clear intention to annex the separate use to the whole fee, and not merely to the life estate. In *Troutbeck v. Boughey*, 2 Eq. 534, a testator gave all his real and personal estate to trustees, in trust for his wife for life, and after her decease, for his daughter absolutely; and he directed that the principal moneys, rents, issues, profits, interest, dividends, and proceeds,

Unless a contrary intention appears.

which his wife and daughter, or either of them, should be entitled to under his will, should be paid into their own proper hands, as the same became due, and not by way of anticipation; and should be for the separate use and benefit of his wife and daughter; and for which moneys, rents, issues, profits, interest, dividends, or proceeds, the receipt alone of his wife and daughter, whether covert or sole, should be an effectual discharge to his trustees. V.-C. Kindersley considered that the terms of the will could only refer to the income and corpus of the personalty and the income of the realty. "How can the fee simple of real estate be paid into her own proper hands?" he asked; he also laid stress on the term "become due," and on the receipt-clause, as being inapplicable to real estate in fee. It might perhaps be contended that the direction as to real estate would not be unmeaning during coverture, for the fee was not intended to be conveyed to the beneficiaries, trustees being required for the separate estate. Moreover, as a gift by will of the rents and profits of real estate will pass the fee, so such a direction as the above, concerning rents and profits, might well be held to extend to the fee.

8. Although it was formerly doubted, it is now well settled, that property given to a woman for her separate use may be held as such during coverture, although the property originally, or at any subsequent period or periods of time, became vested in her when discovered. Whilst the disability of coverture does not exist, the separate use does not arise; when it does exist, the separate use at once arises. *Re Gaffee*, 1 Mac. & G. 541; *Tullett v. Armstrong*, 1 B. 1. And a restraint upon anticipation attaches to the separate estate only, and therefore has no effect except during coverture. (*Ibid.*) But the quality of separate property ceases at the wife's death, and the husband is then entitled *jure mariti* without taking out administration to

Separate
use will
arise as
required.

her personal property in possession, not disposed of by her (*Molony v. Kennedy*, 10 Sim. 254); and he may entitle himself to her undisposed of choses in action as her administrator. If the husband and wife have been judicially separated, and the wife dies intestate during such separation, her property goes as if her husband were then dead. 20 & 21 Vict. c. 85, s. 25.

Infants.

9. An infant cannot, at common law, alien his estate, except by force of a custom; but he may, at common law, do any act, wherein he is a mere instrument or conduit-pipe, just as a *feme covert* may. Upon the same principle it would seem to follow that an infant may execute a power simply collateral, deriving its effect from the Statute of Uses. (Sug. Pow. 177.) In *Hearle v. Greenbank*, 3 Atk. 710, Lord Hardwicke says, "There are several kinds of powers infants may execute; as where an infant is a mere instrument or conduit-pipe, and his interest not concerned. Lord Coke (Co. Litt. 52, 66) says, 'Delivering seisin is a mere ministerial act, and requires no judgment or discretion;' but though the latter words are expressed generally, the law anciently was not so; and in Co. Litt. 128 a, Lord Coke himself cites a passage out of the Mirror, in which it is expressly said an infant cannot be an attorney. As in the sense of an attorney in a court of justice he cannot be; but when we speak of an infant's being an attorney, it is a good deal different from these kinds of powers. Before the Statute of Uses, the power was over the use; therefore all things necessary to be done over legal estates were done by way of conditions; and this was the method of exercising an authority over the legal estates; and at law an infant might perform a condition where it was for his benefit. As to other kinds of powers by an infant, I find no sort of authority." And see *post*, "Powers of Attorney."

Wills by
infants.

As by 1 Vict. c. 26, s. 7, no will made by any person

under the age of 21 is valid, there can no longer be any distinctions as to the nature of the power or the property subject to it; before that Act, an infant might have exercised a power over personalty at the age at which he might have disposed of the same if he had been absolutely entitled to it. (Sug. Pow. 178.)

10. The 11 Geo. 4 & 1 Wm. 4, c. 65, s. 17, provides that the Court of Chancery may authorize leases to be made of land belonging to infants when it is for the benefit of the estate.

Enabling statutes.

It is to be observed that this statute applies only to infants seised or possessed of, or entitled to, any land *in fee or in tail*, or to any leasehold lands for an absolute interest. If lands, therefore, were limited to trustees on trust for such of the children of A. as should attain 21, and if but one should attain that age, the whole to such one, with trusts for maintenance, and a gift over, the case would not be within the statute.

Extent of Act.

In *Re Evans*, 2 M. & K. 318, an estate, of which A. died seised in fee, descended upon A.'s five infant sisters. The father and mother of the infants were both alive, and the estate of the sisters was consequently liable to be divested by the birth of a nearer heir of B. It was held that the infants were not seised in fee within the meaning of the Act.

Does not extend to persons with defeasible estates—

But in *Re Clark*, 1 Ch. 292, where lands were limited in fee, defeasible on certain events happening, the Court held that it had power to authorize leases under the statute, if all persons who could be entitled on any of the events happening were before the Court.

unless all possible claimants are before the court.

And the Court has no jurisdiction under the Act to authorize leases of lands of which the infant is seised in remainder. In *Ex parte Legh*, 15 Sim. 445, the Court dismissed a petition presented under the Act by the tenant for life and the infant entitled in remainder.

Does not apply to infants seised in remainder.

19 & 20
Vict.
c. 120.

11. By 19 & 20 Vict. c. 120, the Court has power to authorize leases of settled estates, subject to certain conditions. (See *post*, "Powers of Leasing.") The interpretation clause provides that "settlement" shall signify any Act of Parliament, deed, agreement, copy of Court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure, or any estates or interests in any such hereditaments, stand limited to or in trust for any persons by way of succession.

By 21 & 22 Vict. c. 77, s. 1, it is enacted that for the purposes of defining settlement and settled estates, all estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement.

Extent of
Act.

It is clear that an infant seised in fee or in tail is not within this Act, "heirs" and "heirs of the body" being words of limitation and not of purchase. And infants, seised for estates in fee, defeasible in certain events, are not seised in succession within the meaning of the Act.

Defeasible
estates.

In *Re Bardin*, 28 L. J. Ch. 805, 7 W. R. 711, a testator devised real estates to trustees on trust for such children of A. as should attain 21; and if but one should attain 21, the whole to that one, with trusts for maintenance and a gift over; the Court held that this was not a limitation by way of succession within the Act. This case, however, is said to be not now law. See *Re Shephard*, 8 Eq. 571, and 27 & 28 Vict. c. 45, by s. 3 of which it is enacted that the question whether an estate is settled shall be governed by the state of circumstances at the time of the settlement taking effect.

In *Re Shephard*, V.-C. Malins said that in his opinion

if an undivided share of an estate is subject to a settlement, the entirety ought to be considered a settled estate.

In *Beioley v. Carter*, 4 Ch. 230, a trust for A. for life, with remainder (subject to a power of appointment given to A.) to the person whom A. should leave her heir-at-law, was held to be a settled estate. *Re Laing*, 1 Eq. 416.

12. By 18 & 19 Vict. c. 43, infants are enabled, with the approbation of the Court, to make binding settlements, on marriage, of their real and personal estate, or of property over which they have any power of appointment, and every conveyance, appointment, and assignment, or contract to make a conveyance, appointment, or assignment, executed by such infant with the approbation of the Court, for the purposes of the marriage settlement, is made valid (s. 1). But the enactment does not extend to powers, of which it is expressly declared that they shall not be exercised by an infant (s. 2). And appointments under powers are avoided, if the appointor dies under 21 (s. 4). The statute does not apply to males under 20, or females under 17.

18 & 19
Vict. c.
43.

13. Mr. Lewin thus states the law as to the effect of the institution of a suit on the powers of trustees (Trusts, 425):—

Execution
of powers
after bill
filed.

If a suit has been instituted and a decree made, the powers of the trustees are thenceforth so far paralysed that the authority of the Court must sanction every subsequent proceeding. Thus the trustees cannot commence or defend any action or suit, or interfere in any other legal proceeding, without first consulting the Court as to the propriety of so doing; a trustee for sale cannot sell (*Walker v. Smallwood*, Ambl. 676); the committee of a lunatic cannot make repairs (10 Ves. 104); an executor cannot pay debts (*Mitchelson v. Piper*, 8 Sim. 64); or deal with the assets for the purposes of investment (*Widdowson v. Duck*, 3 Mer. 494); but it has never been decided

that an executor, after the institution of a suit, cannot sign a valid receipt for any part of the testator's personal estate.

It appears to be only after decree made that the powers of trustees are affected, but it would seem more prudent after bill filed to apply to the Court for directions. Lewin, 442.

Execution
of powers
after
institution
of suit.
Distinc-
tion
between
powers of
manage-
ment, and
of appoint-
ment.

The institution of a suit and decree made appears to affect powers differently, according to their nature. *Bethell v. Abraham*, 17 Eq. 24.

Powers of management, by which is meant, powers of sale, leasing, investment, and the like, as we have seen, are not extinguished, but cannot be exercised without the sanction of the Court, and the Court will take care that they are properly exercised.

Powers of appointment, *i.e.*, powers which are arbitrary as to their execution or non-execution, and which affect the distribution, not the management of the property, are exerciseable after the institution of a suit, and the Court will not control the discretion of the donees thereof: they may therefore be exercised without an application to the Court.

Powers of
manage-
ment.

In *Webb v. Lord Shaftesbury*, 7 Ves. 480, the power was to appoint new trustees; in *Cafe v. Bent*, 3 Ha. 245, to appoint new trustees and to invest. In *Bethell v. Abraham*, 17 Eq. 24, the question was as to a power of investment. The Master of the Rolls held that the trustees had not been given by the testator the discretion of investment they claimed, but that if they had, they could only exercise it with the sanction of the Court, and in that particular case, he should have withheld it.

As to the exercise of powers of sale after suit, see Lewin, 330. The exercise of such powers in accordance with the terms thereof and with the sanction of the Court, will be binding on all persons whose interests would have

been concluded thereby if there had been no suit; but a sale by the Court itself will only bind the persons properly before the Court in the suit. And the mere filing of a bill for the administration of a testator's estate does not necessarily take the conduct of sales out of the hands of trustees for sale. The discretion as to the conduct of the sale is with the judge. *Thomas v. Howell*, 16 Sol. Journ. 754.

But the Court will not interfere with trustees' discretion in the exercise of powers of appointment. Powers of appointment.

In *Sillibourne v. Newport*, 1 K. & J. 602, trustees had power at their discretion to apply any part, not exceeding one-half of the income of the testator's estates, towards the maintenance or education or otherwise for the benefit of A. The trustees continued to exercise this power after the institution of the suit: the Court held that the trustees had not deprived themselves of this discretionary power, and that the payments made after bill filed were properly made.

In *Brophy v. Bellamy*, 8 Ch. 798, there was the ordinary power of maintenance. A petition was presented in the suit praying for the payment of five-eighths of a fund in Court to the father of the children in whose favour the maintenance clause was made. The trustees stated they thought it proper and for the benefit of the children. The Court would not control the trustees' discretion.

In *Ward v. Tyrrell*, 25 B. 563, 27 L. J. Ch. 749, the donee of a power appointed to some of the objects exclusively of the others. A bill was filed to set aside the appointment: he then, *pendente lite*, appointed afresh, in a manner authorized by the power, but declared that the second appointment should not operate unless the first was set aside by the decree of the Court. The first appointment was set aside and the second upheld.

CHAPTER V.

EXECUTION OF POWERS.

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1. It is necessary now to consider the requisites for making the execution of a power valid. The author of the power may surround the execution with as many solemnities, and direct it to be carried out by such instruments, at such times, with the consent of or by such persons as he pleases, provided that he does not transgress the rules of law or equity. Owing to the excessive caution with which the creators of powers fenced the execution of them, it has frequently happened that their own intention, as well as that of the persons executing such powers, has been frustrated. It is a rule both of law and equity that

Requisites
for the
valid exe-
cution of
a power.
Formali-
ties.

Every circumstance required by the instrument creating the power to accompany the execution of it, must be strictly observed.

This rule is modified to a great extent by the aid afforded in Equity to defective executions in certain cases. (See *post*, "Defective Executions aided.")

And it may in some cases be presumed that the deed of appointment is duly executed, although the deed containing the terms of the power is lost. *Hougham v. Sandys*, 2 Sim. 95.

Statutory
interfer-
ence.

And the necessity for a strict attention to the mere formalities accompanying the execution of instruments executing powers has been much modified by the interposition of the legislature, as regards wills executed subsequently to January 1st, 1838, by the Wills Act, and as regards deeds dated since August 13th, 1859, by 22 & 23 Vict. c. 35.

In order that a power might be validly exercised by deed or will dated before those statutes respectively, every circumstance required to be observed, however trivial, must have been strictly adhered to.

In *Hawkins v. Kemp*, 3 East, 410, the terms of the power required that a revocation should be by a deed or instrument in writing, executed in the presence of and attested by three credible witnesses, and enrolled in one of Her Majesty's Courts of record at Westminster, and with the consent of H.'s wife, father, father-in-law, the trustees of a term of 500 years created by the settlement containing the power, as well as by all the trustees to support contingent remainders.

L. C. J. Ellenborough said :—" Every one of these required circumstances is in itself perfectly arbitrary, and (except only as it is in fact required) unessential in point of effect to the legal validity of any instrument, by which the old uses should be revoked, or new uses declared. It is in itself immaterial whether the instrument in writing, purporting so to revoke and declare the uses, should be by deed ; whether such deed should be executed in the presence of what and how many witnesses ; whether it should be afterwards attested by the witnesses, and ultimately enrolled in any court of record ; and whether it should be sanctioned by the consent and approbation of the several trustees named for that purpose. It might (if it had so pleased the parties creating the power) have been done by any writing of the persons so authorized, unsealed, unattested, unenrolled, and unsanctioned by any consent or approbation whatever. If these circumstances are unessential and unimportant, except as they are required by the creators of the power, they can only be satisfied by a strictly literal and precise performance. They are incapable of admitting of any substitution ; because these requisitions have no spirit in them, which can be otherwise satisfied ; incapable of receiving any equivalent, because they are in themselves of no value."

“Whatever arbitrary terms the grantor of the power may impose upon the party executing it, or however absurd and unreasonable they may seem to be, they must be fulfilled; as if it were required that the instrument executing the power should be witnessed by persons of a particular stature, or written on paper of a particular colour.” 10 Cl. & Fin. 425.

2. Although the statutes hereafter set out have rendered this strict observance of mere formalities unnecessary in wills and deeds executing powers since their respective dates, those statutes are not retrospective. And while they would cure such defects as the non-enrolment in *Hawkins v. Kemp*, they would not affect the want of due consent or the like. It is a rule that—

Essential
requisites
must be
observed.

Where anything essential, and not merely formal, such as the consent of any third person, is required to the execution of a power, it cannot be dispensed with, and the conditions under which it is to be given must be strictly complied with.

There is nothing in the statute, nor is there any jurisdiction in Equity, to dispense with requirements of this nature, so as to make good an execution which defeats what the person creating the power has declared, by expression or necessary implication, to be a material part of his intention.

In *Cooper v. Martin*, 3 Ch. 47, a power was given by a testator to A., to be exercised by her before her youngest son attained 25; the residuary estate of the testator was to be distributed at the same period. It was therefore to be presumed that it was the testator's intention that the children should then know what were

their vested and transmissible rights. This power was held to be improperly exercised by a will made before, but not coming into operation until after the period at which the youngest son attained 25. *Reid v. Shergold*, 10 Ves. 370; *Horlock v. Smith*, 17 B. 572, 575.

So, a power to trustees to lend the trust fund to the husband, with the consent in writing of the wife, cannot be properly exercised without her consent previously given (*Cocker v. Quayle*, 1 R. & M. 535); her subsequent assent is not sufficient. *Bateman v. Davis*, 3 Madd. 98; *Wiles v. Gresham*, 2 Drew. 258.

3. By 7 Wm. 4 & 1 Vict. c. 26, s. 10, it was enacted Statutes.
Wills Act. that no appointment made by will in exercise of any power shall be valid, unless the same be executed in manner thereinbefore required (*i.e.*, as a will, in writing signed and acknowledged by the testator in the presence of two witnesses), and every will executed in manner thereinbefore required, shall so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity.

Although the words "shall have been required" appear to point to powers created before the Act, it has been decided that the section applies to powers created since, as well as to those created before the Act. *Hubbard v. Lees*, L. R. 1 Ex. 255.

It may be here observed that a will, made in execution of a power, is entitled to probate, although it is not properly executed according to the laws of the country of domicile of the person making it. *Tatnell v. Hankey*, 2 Moo. P. C. 342.

And the effect of the grant of probate is to conclude Probate. any one from objecting in the Court of Chancery that the

instrument proved is not the will of the testator. *D'Huart v. Harkness*, 34 B. 324, and *cf. Dolphin v. Robins*, 7 H. L. Ca. 390; and see 24 & 25 Vict. cc. 114, 121.

22 & 23
Vict. c. 35.
13th Aug.
1859.

By 22 & 23 Vict. c. 35, s. 12, it was enacted that a deed thereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed, or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such a power should be executed or attested with some additional or other form of execution or attestation or solemnity: Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed, in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument, and nothing therein contained shall prevent the donee of a power from executing it conformably to the power by writing, or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

It will be observed that there is an important difference between these two enactments: by the Wills Act, no will is a good execution of a power to appoint by will, unless it is executed in conformity with the requirements of the statute; but a deed may be a valid execution of a power, if it be executed and attested as an ordinary deed, or according to the terms of the power.

Form of
attestation
clause.

4. It has frequently been a question for the Courts to decide whether a power, which is to be executed, for

example, by signing, sealing, and delivery, such execution to be attested by witnesses, is validly executed, if the attestation clause does not express that all those formalities of signing, sealing, and delivery have been observed, although the instrument itself by which the power purports to be executed, expresses such observance. The cases, to which reference is next made, appear to establish the following rule :—

(a.) If a power requires two or more formalities to be attested, and the attestation clause expressly certifies that one of such formalities has been performed, then the power will not be well executed.

(b.) But if the attestation, although a limited and special one, is of such a nature that it must be necessarily inferred that the other requisites were complied with :

(c.) Or if the attestation is general, then the execution is presumed to be valid, unless the contrary is shown.

The principle is thus stated in *Vincent v. B. of Sodor and Man*, 4 De G. & Sm. 294 :—“ If the attestation expresses in any form of words an act to have been done in the presence of witnesses, by which the complete execution of the instrument, as required by the power, appears to have been effected, it would be sufficient. But when the framer of the power requires two or more such acts to be done, then, if the attestation only expresses the doing of one of them, it would not be sufficient. for, in this latter case, it is clear that the framer of the power really intends something more than the act

expressed in the attestation, because he expressly added the other act.

“If there is a general attestation clause, the exact narration may be dispensed with, to the extent at least of holding that a jury might presume that the witnesses saw those acts done, which the donee of the power, in the instrument executing the power, expressed an intention to do, although there should be no evidence that the witnesses were cognizant of the contents of the instrument containing the power.”

In *Newton v. Ricketts*, 9 H. L. C. 495 ; 1 J. & H. 70, this is more strongly put by Lord Chelmsford, who says that the law must be taken to be, that if *de facto* the power was properly executed, and the witnesses saw that it was so executed, and they had simply signed their names as witnesses, no memorandum of attestation was necessary.

(a.) In *Wright v. Wakeford*, 17 Ves. 454, 4 Taunt. 213, the power was to be executed by deed “signed, sealed, and delivered:” the attestation clause certified that the deed had been “sealed and delivered,” but said nothing of signing: the Court held that, as the attestation clause did not express that the witnesses testified an execution in full conformity with the terms of the power, or, in other words, as the attestation clause was not co-extensive with the power, the execution was void.

This decision caused the passing of 54 Geo. 3, c. 168, by which it was enacted that the omission of the word “signed” in the attestation clause of all deeds made *previously* to the Act, should not render such deeds of no effect; but the Act had no prospective operation.

(b.) In *Vincent v. B. of Sodor and Man*, 4 De G. & Sm. 294, a power of appointment by will, to be signed and *published* in the presence of and attested by witnesses, was held well executed by a will, the attestation clause of which testified that it was

signed and *sealed* in the presence of the witnesses: the ground of the decision was, that a will cannot be made without being published.

In *Smith v. Adkins*, 14 Eq. 402, a power to appoint by any deed or instrument in writing, to be "signed, sealed, and delivered," in the presence of two or more credible witnesses, was held to be well exercised by an appointment by will, not expressed to be "delivered," but stated in the attestation clause to have been "signed, sealed, published, acknowledged, and declared to be her last will," in the presence of the attesting witnesses. The Master of the Rolls said that the publication of a will is equivalent to the delivery of it: no attestation clause was expressed to be required in this case. And see 2 Coll. 112, n.; *Mackinley v. Sison*, 8 Sim. 561; *Bartholomew v. Harris*, 15 Sim. 78; *Re Wrey*, 17 Sim. 201.

(c.) In *Doe d. Burdett v. Spilsbury*, 10 Cl. & Fin. 340, a power of appointment by will, "to be signed, sealed, and published," in the presence of and attested by witnesses, was held well executed by a will (before the Wills Act), the attestation clause of which was merely, "Witness, A. B., C. D., and E. F."

The term "attest" means that a witness shall be present to testify that the appointor has done the act required by the power. In *Freshfield v. Reed*, 9 M. & W. 404, A.'s consent, "duly attested," was required to the execution of a power: a deed expressed to be made with A.'s consent, "testified by his being a party thereto," was held invalid: the power required A.'s written consent, signed in the presence of a witness: and cf. *In the Goods of Eynon*, W. N. 1873, 148.

5. As to the period for perfecting the execution of a power, it may be laid down as a general rule that—

Meaning
of attest.

Period for
perfecting
the execu-
tion of
powers.

The consent of any person required to consent, and also all formalities annexed to the execution, must be respectively given and perfected during the lifetime of the donee of the power. *Hawkins v. Kempe*, 3 East, 410; Sug. Pow. 240, 255.

The consent, which is a material and important element in the execution, is usually required to be precedent to, or at least simultaneous with, the execution: if so, this requirement must be complied with. *Greenham v. Gibbeson*, 10 Bing. 363. But if the terms of the power admit, there seems no real reason, in considering the execution of a power of appointment to be executed by A., subject to B.'s consent, for limiting the time during which B. may consent, to the duration of A.'s life. A.'s appointment may be said to be conditional on B.'s consent: the two are independent powers; and, in the absence of all expression of intention, the consent of B. may as well supplement and render valid the appointment of A., as B.'s consent receives meaning and validity from the appointment of A. See *Offen v. Harman*, 1 D. F. & J. 253; 29 L. J. Ch. 307. In that case a power of releasing certain estates from charges and substituting others in their stead, was to be executed by A. with B.'s consent, "such consent to be signified by some deed to be duly executed by him, and not otherwise," A. executed the power, but B.'s formal consent by deed was not given till nine months after. It was shown, however, that he had agreed by parol previous to A.'s execution: the power was held well executed.

The appointment once made, or the consent once given, the life of the appointor or consenter, as the case may be, seems to have no longer any necessary

connection with the execution by the other of his own power.

The question of the time for perfecting the accompanying formalities is of less importance since 22 & 23 Vict. c. 35. But one of the points decided in *Hawkins v. Kempe*, 3 East, 410, was, that where the creator of the power required the deed executing the power to be enrolled, the enrolment must of necessity be made during the lifetime of the donee of the power, on the ground that the enrolment could not be made without the donee's authority, and that authority of course terminated with his life.

In *Wright v. Wakeford*, 4 Taunt. 213, the Court of Common Pleas decided, by three against one, that the attestation of the requisite witnesses could not be supplied after the death of the donee of the power, although it was admitted that they might have added it during his lifetime. Lord Mansfield differed from the other Judges, and considered that the death of the party, whose act the witnesses were to attest, did not furnish any objection to their signing the attestation after his death, because, when he had once signed, or executed, in the presence of witnesses, the instrument to be attested, he had done all that was to be done by him, and as far as respected him it was completed, and he could not rescind or annul it, although it would not be effectual unless the person to whom it was delivered should procure the witnesses to attest it. But see *Doe v. Peach*, 2 M. & S. 576.

Attestation
of wit-
nesses,
when to be
made.

The decisions of the majority of the Judges in *Wright v. Wakeford*, and in *Doe v. Peach*, are based on the ground that the intention was that the execution, and all its accompanying formalities, should be one complete act, perfected at one time; although it seems to have been admitted that the attestation might have been supplied during the lifetime of the donee of the power,

perhaps on the ground that he might then be taken to renew his execution. But it is now provided (22 & 23 Vict. c. 35) that powers, so far as regards their execution, shall be well executed, if executed in the presence of and attested by two or more witnesses, in the manner in which deeds are ordinarily executed. The intention of the Act is to assimilate the execution of deeds executing powers to that of other deeds. It would appear, therefore, that since that Act (13 August, 1859), so long as the witnesses live and remember the transaction, they may properly sign their attestation of it; for the object of requiring witnesses to attest the execution of a deed is, that they may see that it is fairly and properly executed: as this is the case with regard to ordinary deeds, it must be the same with regard to deeds executing powers.

Objection that the attestation must be simultaneous with the execution, in order to raise uses.

Lord Eldon put his objection to the validity of the execution of the power in *Wright v. Wakeford* on another ground, namely, that the execution of the power was a limitation of an use, and that such an use could not arise except under the circumstances and at the time specified. (And see *Newman v. Warner*, 1 Sim. N. S. 457.) The Common Law Judges did not notice this objection. If the intention of the donor of the power was, that the execution and its accompanying formalities should be one complete simultaneous act (as the Judges decided), this objection seems to be a fatal one to all executions operating under the Statute of Uses. But the argument above suggested, that the Legislature has now assimilated the execution of deeds executing powers with that of other deeds, would apply to this also: for an use can be raised by deed unattested by writing. (See *Warren v. Postlethwaite*, 2 Coll. 114; and Stephen's Comment. i. 503.)

6. The next rule is the converse of the last preceding:

If a power is given, to be executed with the consent of one or more persons, and that one, or any one of the others, dies, the power is gone.

Where consent is requisite.

In *Sympson v. Hornby*, Finch. 452, A. empowered his wife to dispose of his personal estate with the consent of his trustees. The wife purported to dispose of it by will without such consent. It was held inoperative.

In *Atwaters v. Birt*, Cro. Eliz. 856, there was a feoffment to uses, with a proviso that, on payment of 12*d.*, and procuring the assent of the feoffees, the uses should cease. It was held that this gave them an authority, and that, if one of them died, the authority determined.

In *Franklin's Case*, Moor. pl. 172, cited 2 Eden, 333, a testator devised that I. I. and I. K. should sell his lands by the advice of the parson of D.: before the sale the parson died. Held, the trustees could not sell. (And see *Mansell v. Mansell*, Sug. Pow. 252.)

So, a power of revocation to be exercised by A. and B. cannot be exercised by the survivor of them. *Montefiore v. Brown*, 7 H. L. C. 241.

But in *Belt v. Holtby*, 15 Eq. 178, where two persons were appointed protectors of a settlement under 3 & 4 Will. 4, c. 74, s. 32, and one of them died, no provision being made for filling up a vacancy in the office, it was held that the surviving protector, with the tenant in tail, could effectually bar the entail.

Protector of settlement.

In *Green v. Green*, 2 J. & L. 529, a testator gave his son, if he should marry with the consent of A., power to jointure his wife, and to charge a gross sum for children. A. died, and the son afterwards married. Lord St. Leonards held that the power of jointuring and charging was exerciseable by the son, saying that, as he thought the intention of the parties was, that the obligation

to obtain the consent was imposed only during the lifetime of the party competent to give such consent, he should struggle with the technical terms, so as to effectuate the intent of the parties. (See *post*, s. 9.)

Period during which powers may be executed.

7. Ordinary powers may be exercised at any time during the lifetime of the donee: but there is a distinction between the execution of future powers, namely, between powers presently created, but exerciseable on a contingency—powers which do not arise until the happening of a future event,—and powers to be exercised by a contingent person. The question whether any particular power is a future one or not, must depend upon the terms thereof. In *Leigh v. Lord Balcarres*, 6 C. B. 847, a testator devised his real estates to trustees in fee, on trust (so far as is material here) to pay the rents to C. during her life, but impeachable for waste for cutting timber in the lifetime of C., or for digging coal or cannel coal to be opened otherwise than under the power therein contained, with remainder to D. for life, subject to the like restrictions, with other remainders over. The will contained a power “for the person or persons (except C.) who, by virtue of the limitations thereinbefore expressed, should for the time being be seised of or entitled to the actual freehold of the hereditaments,” to grant leases in possession. It was held that this was a power exerciseable by the trustees, who had the legal estate, during C.’s lifetime.

Execution of an existing power on a contingency.

8. A power, presently given to a designated person, to be exercised upon a contingency, can be well executed before the contingency happens.

In *Wandesforde v. Garrick*, Ir. R. 5 Eq. 486, it was held, that where a power is given to a designated person to be executed upon a contingency, it may be executed

before the happening of the contingency, and the execution will be valid on the subsequent happening of the event. *A fortiori*, where the happening of the contingency cannot be ascertained until the donee's death; and an incorrect recital in the instrument executing the power, that the contingency had already happened, was held not enough to invalidate the execution. "It has been decided many times that a power, to operate upon a contingent event, like that of death, may be exercised in the lifetime of the party upon whose death alone that contingency can take effect: otherwise you might never exercise it at all." *Per Lord St. Leonards* (4 H. L. C. 283).

In *Logan v. Bell*, 1 C. B. 872, real estate of the wife was limited to her in fee until her marriage, and from and after the solemnization thereof, to the use of such persons as she should appoint. Her appointment by codicil before the Wills Act, between the date of the settlement and the marriage, was upheld.

In *C. of Sutherland v. Northmore*, 1 Dick. 56, a power was given to a married woman, to be exercised in case of the death of her husband in her lifetime and if there should be a failure of issue of the marriage at her death. She exercised the power in her husband's lifetime and survived him. This was held a valid execution.

In *Holt v. Burley*, 2 Vern. 651, a power to revoke a settlement was given to the wife, if she survived her husband, they not having issue between them; the husband died, leaving a son, who died in the wife's lifetime. The power was held not to be confined to the moment of the husband's death, but to be exerciseable at any time during the widow's lifetime. And see *Dalby v. Pullen*, 2 Bing. 144; *Eden v. Wilson*, 4 H. L. C. 283; and Sug. Pow. 267.

Power to
arise on a
contin-
gency.

9. But a power which is not to arise until a future or contingent event happens, or until a condition is fulfilled, cannot be exercised until the event happens or the condition is fulfilled ; for until then it has in fact no existence.

In *Meyrick v. Coutts*, Sug. Pow. 266, there was a devise to A. for life, and after her decease, a power to trustees to sell and pay the money among the children of B. The Court held that a sale could not be made until after the death of A.

In *Blacklow v. Laws*, 2 Ha. 40, a testator directed an estate to be sold after the death of A. Under the decree of the Court, in a suit to administer the trusts of the will (there being no debts unpaid, and the persons interested in the proceeds being not *sui juris*), this estate was directed to be sold. It was held, however, that the Court could not compel the purchaser to accept the title.

In *Johnstone v. Baber*, 8 B. 233, a testator devised his advowson to trustees on trust to sell on the death of A. A. was the incumbent, so that on his death no sale could be made until the vacancy was filled up. It was held that the Court had no jurisdiction to authorise a sale in the lifetime of A., on the ground that it would be beneficial to the parties. (And see *Mosely v. Hyde*, 17 Q. B. 91 ; *Shaw v. Borrer*, 1 Keen, 559.)

In *Want v. Stallibrass*, 21 W. R. 685, L. R. 8 Ex. 175, there was a devise to trustees for A. for life, "and from and immediately after his decease," to sell. The Court of Exchequer treated it as clear that the power did not arise until A.'s death. If the tenant for life and the persons entitled to the proceeds of the sale are all *sui juris*, they can of course make a good title ; but the power will not in such case come into operation.

But in *Uvedale v. Uvedale*, 3 Atk. 117, there was a devise of lands to the testator's wife for life, and after her decease, the testator willed the same should be sold. Lord Hardwicke said that the words "after her decease" were not put in to postpone the sale; and he held that a sale might well be made in the lifetime of the widow.

It is to be observed, however, that the bill in this case was filed by the widow, who was a specialty creditor. See, too, Co. Litt. 113 a. n. 2.

So, also, in *Ashford v. Cafe*, 7 Sim. 641, a testator gave a fund to trustees for A. for life, and after her death to transfer it to B. in case she should be *then* unmarried; but if she be then married, on trust to transfer the same to such persons as she should, notwithstanding coverture, and whether sole or married, appoint; and in default, for her executors and administrators. B., being then married, died in A.'s lifetime, having made a will in execution of the power. This was held good: *sed qu.*; see Sug. Pow. 265.

Where the performance of an act is made a condition precedent to the exercise of a power, and such performance subsequently becomes by act of the law impossible, the power cannot be executed. If the performance of a condition precedent be prevented, no matter how, and the condition does not take effect, that which was conditioned upon it cannot possibly take effect either.

Condition
precedent
to power.

In *Lord Shrewsbury v. Hope Scott*, 6 C. B. N. S. 1. 220, lands were settled by Act of Parliament so as to be inalienable; but power was given to each tenant in tail to alien on condition of his making the declaration and taking the oaths prescribed by 30 Car. 2, c. 2, & 11 & 12 Will. 3, c. 4, within six months after attaining 18, and continuing a Protestant. These last-mentioned Acts were repealed. It was held that the only effect of the repeal was that the power could not take effect.

In *Earle v. Barker*, 11 H. L. C. 280, a testator gave his residuary estate to his executors on trust for A. for life, and after the death of A., *provided he shall leave any child or children him surviving*, on trust for such persons generally as A. should appoint by will; but if A. should die without leaving any child or children him surviving, and should not previous to his death make such appointment as aforesaid, then on trust for B., C., and D. A. died without ever having had a child, leaving a will, by which he purported to execute the above power. It was held (affirming the Master of the Rolls, 33 B. 353), that A. never having had a child, the condition on which the power was founded had not occurred, and the power never came into existence: the will of A. was therefore inoperative as an appointment, and the property went as in default. Lord Westbury thought that the testator meant to provide for a double contingency by the gift over: if there should be no child, in which case there would be no power, or if there should be a child, but the power should not have been exercised, then the gift over was to take effect.

No distinction
between
real and
personal
estate,
semble.

There appears to be no difference between real and personal estate in this respect. In the last case the property seems to have been a mixed residue; there is no question of property vesting, as to which different principles are applicable, according as it is real or personal estate (2 Jarm. on Wills, 1). The question is, has the event happened or the condition been fulfilled upon which, and upon which only, the power was to arise? If it has not, there is no power to be exercised, whether the property be real or personal.

The important distinction would appear to be between cases where the power is not to arise except on the happening of an event or the performance of a condition; and cases where the power is called into existence, but its execution is made dependent on some condition.

In the former case, as the power never comes into existence at all, it can never be exercised, and the nature of the condition precedent to its creation can make no difference. The case is analogous to that of a condition precedent to the vesting of real estate, as to which Baron Parke (4 H. L. C. 121) says: "Supposing (the condition or contingency) to be illegal, if it be precedent, and the event does not happen, or if it be impossible, and therefore cannot happen, the party never obtains the estate." But in the latter case, when the power is called into existence, but its execution is made contingent on some event or condition, it will be a question of intention in each case whether such event or condition was intended to be so indispensable to the execution of the power as to render any execution impossible, if the event or condition becomes itself impossible. (Cf. 2 J. & L. 539.)

It seems doubtful whether a direction to sell real estate for the payment of debts, *in case the personalty should be insufficient*, is a conditional power, or an absolute charge of debts.

In a case where a testator said "in case it should fully and sufficiently appear" that the executrix should not find sufficient personalty to pay his debts, then he desired that she should sell Whiteacre, it was held that the power of sale did not arise until the deficiency of the personal estate appeared in the manner specified by the will. *Dike v. Ricks*, Cro. Car. 335. But Lord Romilly has held that, where a testator says "if my personal estate is insufficient to pay my debts, there shall be a charge on my real estate," it is no more than saying, "I charge my real estate with payment of my debts," for the personal estate is primarily liable, and the charge can never arise until the executors find the primary fund deficient. *Greetham v. Colton*, 34 B. 615.

Power of sale in case of deficiency of personalty to pay debts.

The distinction, depending on the words "fully and

sufficiently," seems a narrow one. The Courts, before real estate was made assets for the payment of all debts, probably felt it incumbent on them to construe more strictly charges in form conditional, which imposed a burden to which the land would not, without such charge, be subject ; but since 3 & 4 Will. 4, c. 104, the conditional form is of less importance, as the real estate will be applicable for payment of debts in any case. It is rather a question of convenience, and probably the Courts would follow the later decision, unless in a case exactly similar to that in *Dike v. Ricks*.

Although part of condition unfulfilled.

And Lord Romilly has held a power in form conditional exercisable, although part of the condition was not fulfilled. In *Davidson v. Rook*, 22 B. 206, a testator, having two children, empowered his widow, if his children should conduct themselves to her satisfaction up to the age of 25, and *marry with her approbation, but not otherwise*, to give them 1000*l.* each for the purpose of setting out in the world. The Master of the Rolls held that the widow had power, on the children attaining 25, to give them 1000*l.* respectively, although they were unmarried. Lord St. Leonards (Pow. 266) disapproves of this decision, and says the words in italics should not have been disregarded. It may perhaps have been considered that the paramount intention was to enable the children "to set out in the world," a proceeding which has no necessary connection with marriage.

Can the event on which the power is to arise be accelerated by the parties ?

10. The question, whether the event on which the power is to arise can be accelerated by the act of the parties, depends on the nature of the power. There is a distinction in this respect between powers which are a burden on the estate, and powers which are simply administrative.

Burden-some powers.

The law is stated in *Truell v. Tyssen*, 21 B. 444: "It seems to be, if not settled, at all events the better

opinion, and one which the Court would be disposed to act on, that when a power to charge an estate is given under circumstances like these—that is, when there are two successive life estates and an estate in remainder, and a power is given to the tenant for life in possession to charge, that power cannot be exercised by the second tenant for life upon the first surrendering his life estate, so as to bring the second into possession. The reason is obvious, that it might be done for the purpose of fraud, and for multiplying the charges on the estate against the remainderman. The testator has given the property in such a way that the estate of the person in remainder shall not be charged by the second tenant for life, until he comes into possession of the estate on the death of the first tenant for life. If it were otherwise, the result might be this: the first tenant for life might surrender his estate, and so enable the second to create the charge, and he might afterwards die before the first tenant for life, and a charge might thus be created which was never contemplated, and which could never have taken effect under the strict words of the settlement; great frauds might thus be committed. But I am of opinion that this reasoning does not apply to a power of sale; a charge diminishes the estate of the remainderman, but a sale or exchange does not; and the reasoning, as applicable to accelerating a power to charge, fails in regard to a sale or exchange. In the case of a charge, it is the intention of the testator that the interest of the remainderman shall not be diminished, except in the particular case specified. But in the other case there is no diminution of his interest, but only a change in the property. The same presumption, therefore, does not arise.” (Sug. Pow. 269.)

Adminis-
trative
powers.

The reasoning applicable to the acceleration of powers to charge would apply to ordinary powers of selection and distribution: the persons entitled in default of ap-

pointment occupy the same relation to the objects of the power as the remaindermen in cases of powers to jointure occupy to the tenant for life and his wife.

Reversions
may be
sold.

11. The mere fact of the subject of a power of sale being a reversion, will not prevent the exercise of the power, if it be given immediately.

In *Blackwood v. Burrowes*, 4 Dr. & War. 441, 468, Lord St. Leonards says: "It is settled by the authorities that, unless there is a restriction against an immediate sale, the power may be exercised at once, so as to increase the interest of the tenant for life at the expense of the remainderman; for if, instead of waiting for the expiration of the particular estate, the reversionary interest be sold, it must of course be sold at a much less price than the estate in possession would have produced. The authorities have, however, settled the question, and I think wisely, that if there be no intention expressed, the power may be exercised immediately." In that case, the reversion, after the determination of two life estates, was settled on the marriage of the reversioner; the settlement contained a power of sale; and it was held that such a power must be exercised before the reversionary interest became an estate in possession; and see *Clark v. Seymour*, 7 Sim. 67.

In *Giles v. Homes*, 15 Sim. 357, a reversion of a moiety of a farm was settled on a marriage, and the trustees were empowered to sell it when in possession. The settlement contained a covenant by the husband and wife to convey any other share or interest in the said farm which they might afterwards acquire to the trustees, so that it might become vested in them upon the trusts and subject to the powers declared of the settled moiety. After the first moiety had fallen into possession, a moiety of the other moiety came to the wife by descent, subject to a life estate. It was held saleable under the power; the

suspension of the power over the first moiety did not extend to the after-acquired share; and see *Tasker v. Small*, 6 Sim. 625, 3 M. & C. 68.

12. A general power, affecting the legal estate in land given to a contingent person, could not, under the old law, be exercised, until the person to exercise it was determined by the event.

Execution of power over legal estate by contingent persons.

(a.) As to its execution by deed.

By deed before 8 & 9 Vict. c. 106.

A contingent interest and a contingent right to exercise a power stand on the same footing; consequently, the same principle that made contingent interests inalienable (before 8 & 9 Vict. c. 106) was held to extend to prohibit the exercise of a contingent power over the legal ownership; in other words, as an use limited to the survivor of two persons could not, under the old law, be aliened until after the survivorship, so a power to declare an use, given to the survivor of two persons, could not be exercised except by the actual survivor. But in equity this rule never prevailed. A power to the survivor of three persons to declare a trust for his own benefit is not distinguishable from a trust for the benefit of the survivor; and, as a contingent equitable interest was always alienable by deed or by will, it follows that a person who has a contingent right to appoint an equitable estate for his own benefit could always exercise the power, subject to the contingency. (See Lord Westbury's judgment in *Thomas v. Jones*, 1 D. J. & S. 63.)

Different rule in equity.

It follows from this that contingent legal interests, being now by 8 & 9 Vict. c. 106, made alienable, stand on the same footing as contingent equitable interests before the Act, and that powers given to contingent persons of appointing legal estates, being governed by the same

principles, are also exerciseable in the same way that powers given to contingent persons of appointing equitable estates have always been : but this has not been yet expressly decided.

(b.) As to its execution by will.

By will
before the
Wills Act.

Before the Wills Act, a power affecting the legal estate, given to a contingent person, was not well exercised by the will of that person made before the contingency determined—for the will spoke from its own date, at which time the power was in the nature of a contingent use—and such uses were only devisable when they were descendible, and this they could not be, unless the person who was to take was certain. (*Selwyn v. Selwyn*, 2 Burr. 1131.) This was so decided in *Doe v. Tomkinson*, 2 M. & S. 165.

Not applic-
able to
equitable
estates.

This did not apply to equitable interests, and therefore not to powers affecting the equitable estate only. But since the Wills Act (1 Vict. c. 26), a will speaks from the death of the testator, and consequently, a will made by the actual survivor of two donees of a general power during their joint lives, will operate from the date of the testator's death, and will therefore be effectual.

In *Thomas v. Jones*, 1 D. J. & S. 63, a general equitable power of appointment was given to the survivor of A. and B. A., who was a married woman (with testamentary capacity under her settlement), by her will, made in 1838 and in the lifetime of B., who subsequently died in A.'s lifetime, made a general devise of her real estate. This was taken as executed immediately before her death; the general devise therefore operated as a good appointment under the power which she then had.

Execution
of powers
by contin-
gent
persons by
will since
the Wills
Act, and
by deed
since 8 & 9
Vict.
c. 106.

The rule to be deduced from Lord Westbury's judgment in *Thomas v. Jones*, 1 D. J. & S. 63, and from the general principles of law, although no cases have as yet expressly decided it, is that

A general power of appointment, whether affecting the legal or equitable estate, may now be well exercised by deed or will, by a contingent person, who, in the event, proves to be the person actually entitled to exercise the power.

13. But the case of a power, which has no existence in the events that happen, must be distinguished.

Powers which prove to be non-existent.

In *Price v. Parker*, 16 Sim. 198, stock was transferred to trustees on trust for such persons as A. and his wife should jointly appoint, and in default, for the wife for life; and if she should survive her husband, for her absolutely; but if she should die first, on trust for him for life, and subject thereto, for such persons as the wife, notwithstanding coverture, should by will appoint. The wife, in her husband's lifetime, made a will in exercise of the last-mentioned power, but survived her husband. Probate of her will was on her death limited to property of which she had power to dispose. It was held to be inoperative; the event of her husband's death before her left no power for her to execute. And see *Trimmell v. Fell*, 16 B. 537; *Noble v. Willock*, 8 Ch. 778. It is to be observed that the limitations in these cases were those usually inserted in marriage settlements; it would seem advisable in order to prevent the recurrence of such questions to give the wife a testamentary power exercisable in any event.

14. The rule mentioned in s. 12 must not be taken as applicable to limited powers. Lord Westbury expressly excludes powers which are given for the benefit of special objects, and which are in the nature of trusts; or which are given to trustees to be used, as sound discretion may decide, at a particular period. General powers are equivalent to absolute ownership; and the technical objection to the alienation of contingent legal estates

Limited powers cannot be executed by contingent persons.

being now abolished, there is no reason for continuing the restriction on the exercise of contingent general powers. But this does not apply to limited powers, which are exerciseable for the benefit, not of the donee, but of the objects of the power (and see Sug. Pow. 120). Consequently, the law, so far as concerns limited powers, remains unaltered, and the rule is, at any rate as to appointments by deed, that

By deed.

A limited power, given to a contingent person, cannot be exercised until the person to exercise it is determined.

In *Macadam v. Logan*, 3 Bro. C. C. 310, a power of appointing a sum of stock amongst the children of a marriage, which was given to the survivor of the husband and wife, was held to be not well exercised by a joint appointment.

By will.

It is not, however, quite clear that the same rule would apply to an appointment by *will* made by the actual survivor, since the Wills Act. In *Cave v. Cave*, 8 D. M. & G. 131, there was the usual joint power, in a marriage settlement of personalty, to appoint any children, given to the husband and wife; and in default of such appointment, as the survivor, *after the decease of the other*, should appoint; the husband made a will during his wife's life, exercising the power, and survived her. It was held that, by the very terms of the power, the appointment was bad, and that the 24th section of the Wills Act did not apply; but this decision seems to rest on the peculiar wording of the power. It does not at any rate expressly decide that s. 24 has no reference to wills purporting to execute limited powers. In *re Twiss*, 15 W. R. 540, Lord Cairns said that a power of revocation of an appointment to a child under the usual power in a settlement would need express words to enable it to be

executed by the ultimate survivor during the joint lives. L. J. Turner seems to doubt whether such a power could be given at all.

15. A power, determinable on the happening of any event (*e. g.*, bankruptcy) must be exercised before such event, in order to make such execution valid : and for this purpose a will is considered to speak from the death of the testator.

Period for
executing
determin-
able
powers,

In *Potts v. Brittan*, 11 Eq. 433, a fund was held on trust, in the events that happened, for B. P. for life, with remainder for such persons of a certain class as B. P. should by deed or will appoint, and it was provided, that if B. P. should commit any of certain specified acts, his life estate should determine, and the trust fund go as if he were actually dead, and all powers therein contained should be thenceforth exercised as if he were then dead. B. P. exercised his power by will, but subsequently committed an act of forfeiture ; the appointment was held invalid ; and see *Cooper v. Martin*, 3 Ch. 47. (As to whether a power is intended to be determinable on bankruptcy or insolvency, see *ante*, p. 12, and *Parsons v. Parsons*, 9 Mod. 464 ; *Re Aylwin*, 21 W. R. 864, 16 Eq. 585). A power of revocation to be exercised by A. and B., or the survivor of them, *during their joint lives*, determines on the death of either A. or B. *Re Twiss*, 15 W. R. 540.

In *Re Burrowes*, Ir. R. 2 Eq. 468, a testator devised lands to his two brothers successively for life, and authorized them "when and as soon as they shall respectively become seised of an estate of freehold in possession," by deed or writing "to be made upon or previously to

their marriage," to charge the estates with a jointure and gross sum for younger children. The testator died in 1834; the brother, who took the life estate under his will, had married in 1825; he purported to exercise his power of charging given by the testator's will, in 1844. The Court considered the power authorized antenuptial settlements only, and held the execution in 1844 to be invalid.

Power of
sale within
five years.

But in *Pearce v. Gardner* (10 Ha. 287), a power to trustees of a will to sell, with all convenient speed and within five years (but without any words forbidding a sale after that period), was held not to be restrained to five years. And see *Cuff v. Hall*, 1 Jur. N. S. 972. As between the trustees and the *cestuis que trusts*, the onus of showing that the latter are not prejudiced lies on the trustees; and people who deal with trustees raising money at a considerable distance of time and without an apparent reason for doing so, must be considered as under some obligation to inquire and look fairly at what they are about. *Stroughill v. Anstey*, 1 D. M. & G. 654; *Devaynes v. Robinson*, 24 B. 86.

Power of
appoint-
ment
among
children,
when there
is an only
object.

16. A power of appointment among children is not necessarily extinguished because there is an only object; it depends on the nature of the power; if it be merely to limit the proportions in which children are to take, it cannot of course be exercised if there is an only object. (*Campbell v. Sandys*, 1 S. & L. 281, 293.) But if it be a power to appoint among children "in such proportions, with such conditions, restrictions, and limitations, &c.," it may be well exercised although there is an only object.

In *Bray v. Bree*, 2 Cl. & F. 453, a fund was vested in trustees on trust for all and every the child and children of a marriage, in such shares and at such age or ages and subject to such conditions and limitations as the

wife should appoint. There was one child only: the wife appointed to such child for her separate use for life, and after her decease to her general appointees, and in default of appointment, to the child's executors and administrators. This was held good; and the child (a married woman) having appointed the fund by will, her appointee was held entitled as against her husband.

But where lands are limited by marriage settlement to the use of such children of the marriage for such estate and estates, and subject to such powers, provisions, conditions, and limitations as A. shall appoint, and in default of children to A.'s general appointees, and there is an only child, a defeasible appointment cannot be made to him. In *Doe v. Denny*, 2 Wils. K. B. 337, the donee of such a power appointed to the only son in fee, with an executory limitation over in case he died under twenty-one and without issue. The son survived the donee of the power, but died under twenty-one: it was held that his heirs were entitled, and not the executory appointee. The Lord Chief Justice thought that as she had a son living, she could not dispose of the estate from him or alter his estate. That is, she could not make his estate defeasible in any event. For in *Roe v. Dunt*, 2 Wils. K. B. 336, which was similar to *Doe v. Denny*, the Lord Chief Justice thought that a single child in such a case might be made a tenant in tail: the reporter, however, doubts this. Lord St. Leonards (Pow. 415) thinks there is no ground for the doubt; and that, at any rate, where the power is to appoint for such estate and estates as the donee pleases, the words of the power cannot be satisfied without giving the donee a power to limit the quantity of estate to be taken by a single child, the only object of the power.

Defeasible
appoint-
ment.

The result seems to be that under a power, which is

not merely one of distribution, an appointment may be made of any estate to an only object, provided that such estate be absolute and not defeasible ; but the appointor cannot of course prevent the estate appointed from merging in any larger estate to which the object may be entitled in default of appointment ; *e. g.*, if the appointment is for life, and the limitation in default is to the object in fee. This would not apply to an appointment to the object in tail, as estates tail do not merge in the fee. 13 Edw. 1, c. 1.

Extent to which a power is exercisable, when one or more of the objects dies.

17. Where a power is given by will to appoint property amongst several objects, and the subject, in default of appointment, is given to them *nomination and not as a class, as tenants in common*, the death of any of the objects of the power, before the testator, will to that extent defeat the power and the devise over ; the power and devise over will only remain as to the shares of the survivors. Sug. Pow. 421 ; *Reade v. Reade*, 5 Ves. 744 ; 2 Jarm. on Wills, 217.

If, however, an object survive the testator, but die before the donee of the power, the power and devise over will remain. *Boyle v. B. of Peterborough*, 1 Ves. Jun. 299.

And if the gift in default of appointment is to the objects *as joint tenants*, or as a class, the death of any of them, even in the testator's lifetime, leaves the power unaffected. (*Ibid.*) And it makes no difference that the power is not an exclusive one, or that the class of objects comprises persons named.

In *Paske v. Haselfort*, 33 B. 125, the Master of the Rolls said, that it is settled that if a power of appointment is given to a person to divide a fund amongst the members of a particular class, the death of some members of that class before the exercise of the power will not prevent the donee of the power from exercising it in favour of the surviving members of the class ; even

though, if the deceased persons had been alive, they must have had a share.

The difficulty in that case was that the will especially directed that the appointment should be made to a person by name, and to others as a class. The person named died, and the donee appointed among the members of the class; it was held good. The Master of the Rolls seems to have been of opinion that if a power authorized a non-exclusive appointment to "my children A., B., and C., and any other children whom I may have," it might be exercised after the death of A., B., or C., or all of them. And see *Woodcock v. Renneck*, 4 B. 190, 1 Ph. 72; *Houston v. Houston*, 4 Sim. 611.

18. A power may in general be executed by different appointments made at various times.

Powers need not be exercised *uno flatu*.

Were this otherwise, under the ordinary power in a marriage settlement to appoint trust funds among children, no appointment could be made to a child on marriage or settlement in life, until all the other children had also become of such an age that their future destination could be ascertained and fixed. *Cunynghame v. Anstruther*, L. R. 2 Sc. & D. 223; Co. Litt. 237 a; *Digges' Case*, 1 Co. Rep. 173; *Omerod v. Hardman*, 5 Ves. 722; Sug. Pow. 272; *Zouch v. Woolston*, 2 Burr. 1136; *Doe v. Milborne*, 2 T. R. 721. But see *Brown v. Nisbet*, 1 Cox, 13, observed on in *Webster v. Boddington*, 16 Sim. 177.

19. One consequence of this rule, and of the doctrine of equity, that a mortgage is merely a security for a debt, is that the donee of a general power of appointment or revocation, who exercises it by way of mortgage in fee, does not thereby fully execute the power in equity, although he has at law appointed the whole fee: the

equity of redemption remains unappointed: but when this is reserved to persons other than those entitled under the deed creating the power, as, for instance, to the appointor, his heirs and assigns, the question arises whether this reservation is to be taken as an appointment of the equity of redemption, so as to defeat the persons entitled in default of appointment.

It is in such case a question of intention, but by analogy to mortgages made in cases not under powers, where the right to redeem is limited to a person who had either no interest, or a partial interest only, in the land at the time of the mortgage, and the rule which holds with respect thereto, viz., "that a strong indication of intention is necessary to transfer the beneficial ownership of the equity of redemption from the person entitled to the beneficial ownership of the estate at the time of the mortgage, or to vary his rights" (Co. Litt., 208 a.) It may be laid down that

When the reservation of the equity of redemption operates as an appointment.

A strong indication of intention to deal with the equity of redemption is necessary to make an appointment by way of mortgage extend to an appointment of the whole estate, and the mere reservation of the right to redeem to persons other than those to whom the estate is limited in default of appointment in the deed creating the power, is not of itself, in the absence of all other evidence, sufficient. *Ruscombe v. Hare*, 2 Bl. N. S. 192, 6 Dow. 1.

The rule apparently applies most strongly to mortgages of the wife's estate by the husband and wife, and least strongly to cases where the owner merely takes a more beneficial interest in his own estate than he had

given himself in the original settlement. *Anson v. Lee*, 4 Sim. 364. "The principle is this—that in a mortgage, the mere form of reservation of the equity of redemption is not of itself sufficient to alter the previous title. In such a case (where fraud is out of the question) it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage. This is conformable to the principle upon which other cases have been determined. If a lease be made by tenant for life, under a power created by a settlement, and a rent is reserved to the lessor and his heirs (which is not an unusual blunder), those words are interpreted by the prior title, and applied to such persons as, under the settlement, may be entitled to the estate in remainder, and not to the heir of the lessor, unless he happen to be such remainderman. In all such cases the words used are to be interpreted according to the title when the instrument is executed. So where an estate belonging to the wife is mortgaged, and the equity of redemption is reserved to the heirs of the husband, there is a resulting trust for the wife and her heirs." *Per Lord Redesdale*, 1 Bl. 114.

If the intention of the wife be clear that the husband should have her estate, he must of course have it; but it is an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife, or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where the words admit of any ambiguity, that there is a resulting trust for the benefit of the wife, or for the

Effect of
wife join-
ing in
mortgage.

benefit of the husband, according to the circumstances of the case. *Ibid.*, 126.

The general doctrine is, that equity considers an execution of a power of appointment or revocation which is made by way of security to let in a particular incumbrance, as an execution *pro tanto* only; and in a case submitted for the opinion of L. C. B. Macdonald and V. C. Shadwell (2 Mer. 179, n.), where estates were conveyed by Lord Orford in strict settlement with a power of revocation and new appointment, and he subsequently transferred a mortgage on them by deed, which took no notice of the settlement, and which provided that the estates should, on payment of the mortgage-debt, be re-conveyed to Lord Orford, his heirs and assigns, or unto such person and persons as he or they should direct and appoint, both counsel were of opinion that, the intention being merely to transfer an incumbrance, and no notice being taken of the settlement, and there being no recital of a desire to vest the fee in opposition to the uses of the settlement, the equity of redemption went according to the limitations of the settlement.

In *Whitbread v. Smith*, 3 D. M. & G. 727, A. settled estates by deed in 1817, to such uses as he and his wife should jointly appoint, and in default to the use of himself for life, with remainder to the use of his wife for life, with remainder to the use of his son in fee. A. and his wife made several mortgages, all, except one, limiting the equity of redemption consistently with the uses of the deed of 1817. In 1832 they made another mortgage, which limited the equity of redemption to A. and his wife, their heirs and assigns, or to such persons as they should direct. It was held that this proviso was not intended to vary the limitation of the equity of redemption, and did not defeat the limitation of the fee in the deed of 1817; and see *Wood v.*

Wood, 7 B. 183; *Hipkin v. Wilson*, 3 De G. & Sm. 738; *Re Betton*, 12 Eq. 553; but see *Atkinson v. Smith*, 3 D. & J. 180, a case which Lord St. Leonards says it would be difficult to reconcile with *Whitbread v. Smith*, Pow. 285.

20. But it will be otherwise, if there be other indicia of an intention to alter the destination of the estate, besides the mere variance in the persons to whom the reconveyance is to be made on repayment. Where the form of the equity of redemption has nothing to do with the limitation of the estate; where the limitation of the estate is perfectly distinct, the rules which have been established in the cases of resulting trusts do not in any degree apply. 1 Bl. 128.

Evidence
of inten-
tion to re-
settle.

In *Rowel v. Whalley*, 1 Cha. Rep. 116, the wife joined with her husband in a mortgage of her lands by a deed containing a proviso and declaration that if the husband and wife, or either of them, or their heirs, executors, &c., repaid the debt, the fine to be levied in accordance with a covenant contained in the mortgage deed should enure to the husband and wife and the longest liver of them, with remainder to the right heirs of the husband. That was a case of distinct declaration, in no manner depending on the proviso for redemption, but defining the course in which the property was to be carried after the satisfaction of the mortgage. A fine was afterwards levied according to the agreement, and after the husband's death the widow filed a bill to redeem. It was determined that the subsequent declaration and limitation having no connection with the proviso for redemption, but declaring what should become of the property after the mortgage was satisfied, operated against the construction of a resulting trust for the benefit of the wife. It was held to be a distinct settlement, and that she had parted with her estate.

The question in each case to be decided is more one of fact than of law; for in each case it is to be discovered whether or not there is a sufficient indication of an intention to vary the previously existing limitations: and see *Heather v. O'Neil*, 2 D. & J. 410.

In *Jackson v. Innes*, 1 Bl. 104, lands were settled to the use of A. and his wife successively for life, with remainders over, and the deed contained a joint power of revocation and new appointment. A. and his wife mortgaged the lands for a term of years, and covenanted to levy a fine, to enure to the use of the mortgagee, his executors, administrators, and assigns, for the remainder of the term, subject to the proviso for redemption; and from and after the expiration thereof, to the use of A. and his wife for their lives, and the life of the survivor of them, with remainders over, inconsistent with those limited by the former settlement. Lord Redesdale said that the operation of the deed as to the mortgage term, and as to the limitation in fee, was wholly distinct, and did not in any way depend on each other. The question did not arise on the interpretation of the proviso for redemption, but on a distinct and subsequent clause. The term and the fee were kept distinct: the term was the security for the money: on its ceasing, the operation of the deed, so far as it declared the limitation of the estate subject to the term, remained perfectly distinct, and had no connection whatever with the existence of the term, which then would have ceased to exist. Lord Eldon concurred in this decision, although it reversed his own judgment in the Court below. 16 Ves. 35; Sug. Pow. 278.

Recital not
necessary,
but inten-
tion must
be clear.

Although it is not necessary, as once stated by Lord Eldon, that there should be an express recital in order to alter the destination of the estate, the evidence of intention must be clear. "If the equity of redemption

is reserved as to part of the estate in one way, and as to another part of the estate in another way, the argument is very strong indeed in favour of these different limitations having been intended to mean different things, and even of both having been intended to mean exactly what they imported. It may be shown on the face of a mortgage deed that there is an intention to resettle the equity of redemption, but it must be shewn by something which bears expressly on that identical point. I do not say that it must be stated in terms that there is an intention to resettle, but it must be shewn unequivocally that there is the intention." *Per V. C. Wickens. Re Betton*, 12 Eq. 557; *Barnett v. Wilson*, 2 Y. & C. 407; *Edleston v. Collins*, 3 D. M. & G. 1.

There is some difference, too, between an ordinary mortgage by appointment under a power, and an appointment and conveyance to trustees upon trusts expressly declared. In the case of a mere ordinary mortgage, in which the reservation of the equity of redemption differs from the original limitations of the estate, the Court has no guide for determining between the constructive trust which arises from the terms in which the equity of redemption is reserved, and the trust which would otherwise result; but where there is a trust expressly declared, it is far otherwise. The Court cannot reach back to the original limitations without countervailing the trust which is expressly declared. Again: where there is an appointment by a person having an absolute power, he is the entire owner or master of the property, and no liability can attach upon him in whatever mode he may think proper to reserve the equity of redemption: but the case is surely very different where there is such an appointment coupled with a conveyance by the trustees who hold upon trusts subject to the power. Such trustees cannot be justified in conveying, unless there

Difference between mere mortgage and conveyance on express trusts.

be an intention to alter the limitations. Per L. J. Turner in *Heather v. O'Neil*, 2 D. & J. 415.

In *Fitzgerald v. Fauconberge*, Fitzg. 207, A. being seised in fee in 1712, settled his estate to the use of himself for life, with remainders over, reserving to himself a power of revocation by any writing attested by three witnesses. In 1715, A. by lease and release attested by two witnesses, reciting that he was indebted to the persons named in the schedule, conveyed to trustees and their heirs on trust to raise out of the rents and profits, or by sale or mortgage, sufficient to pay his scheduled debts; and after payment thereof to pay the overplus (if any), and reconvey such part of the premises as should remain unsold to A., or such other person, and for such uses as he by deed attested by two witnesses should direct. It was contended that the deed of 1715, being made for a particular purpose, would be a revocation *pro tanto* only, and that the residue of the estate continued subject to the old trusts; but the Lord Chancellor, the Master of the Rolls, and the Lord Chief Baron were all of opinion that the deed of 1715 operated as a total revocation of the deed of 1712: and see *Martin v. Michell*, 2 J. & W. 413; *Atkinson v. Smith*, 3 D. & J. 186; *Anson v. Lee*, 4 Sim. 36, and the remarks thereon; Fisher on Mortgages, 297; Sug. Pow. 276.

21. A power cannot be validly executed, except by such instrument or instruments as shall have been specified by the author of the power.

By will
when a
deed is
required.

If a power is to be executed by deed it cannot be validly exercised by will. *Lord Darlington v. Pulteney*, Cowp. 260; *Lady Cavan v. Doe*, 6 Bro. P. C. 175. In *Bushell v. Bushell*, 1 S. & L. 96, there was a joint power of appointment by deed given to husband and wife: the

husband made his will, and after his death his wife endorsed thereon her approbation of the disposition of the property thereby made. This was held bad, nor would it have been better if the wife had ratified it at the time of the execution, it being revocable by the husband during his life. (For cases when equity will aid defects of this sort, see *post*, "Defective Execution aided.")

A power to be executed by will cannot be validly exercised by any instrument to take effect in the lifetime of the donee of the power. *Reid v. Shergold*, 10 Ves. 370.

By deed when a will is required.

If, however, the instrument purporting to execute the power shows really a testamentary intention, it is not to be considered as a deed merely because it bears a seal, or is in other respects in the form of a deed; but if it is in substance a deed, if it shows an intention that it should operate as an act *inter vivos*, an act by which the party who executed it would lose the power of dominion over the property which he previously possessed, it must be regarded as a deed. *Marjoribanks v. Hovenden*, Dru. 11.

Testamentary intention.

But an instrument, in form a deed, will not be held to be testamentary from the circumstance that the limitations, owing to the nature and state of the property, cannot take effect until after the death of the appointor. *Hougham v. Sandys*, 2 Sim. 95, 137; *Thomson v. Browne*, 3 M. & K. 32.

Not to be implied from limitations.

A power to appoint "by a will or otherwise," or "by deed or otherwise," of course includes all methods by which the property subject to the power can legally pass. And a power to be executed by an "instrument in writing" can be executed by will. For a will is an instrument in writing; but the formalities required must be observed. For the power is not in terms a power to appoint by will, and whether it has been duly exercised

A will is "an instrument in writing."

by will or not, depends on the inquiry whether the will answers the description of the required instrument contained in the power. If one of the requisite solemnities be wanting, the will does not do so, and the Statute of Wills does not make it answer. The statute applies to powers requiring specifically a *will*, with other solemnities in addition to the solemnities rendered necessary by the statute, and in such case declares that a will without such additional solemnities shall be sufficient; but it does not touch the case of a power requiring an *instrument in writing*, signed, sealed, and delivered. The only principle on which a will was ever held to be a good execution of such a power was that it answered the description. If it does not, it is not an execution, and the statute can afford no help. *Taylor v. Meads*, 4 D. J. & S. 597, 34 L. J. Ch. 203, 13 W. R. 394; *West v. Ray*, Kay, 385; *Buckell v. Blenkhorn*, 5 Ha. 131, is overruled on this point.

Will according to law of domicile.

A power to appoint by will does not mean by any one particular form of will recognised by the law of this country, but by any will which is entitled to probate here. *D'Huart v. Harkness*, 34 B. 324. An appointment by will executed according to the requirements of the power is entitled to probate, though it does not follow the formalities of the law of the domicile. *Goods of Alexander*, 29 L. J. Prob. 93. The law takes a liberal view, and where the instrument creating the power directs it to be executed by will, in a particular form, a will may be good for the purposes of the appointment, if executed according to the law of this country, though not according to the law of domicile. That is, where the instrument creating the power directs it to be executed by will, executed in a particular way, it may be a good will if executed in the form required, though not according to the law of domicile. 34 B. 328.

In *Brodrick v. Brown*, 1 K. & J. 328, V.-C. Wood said that a power to dispose of personalty standing in the name of trustees, "by deed or deeds, instrument or instruments, or by will," would be well executed by a written order directed to the trustees. If the donee were himself sole trustee, a cheque on the bankers where the fund was lying would be a good appointment, if he had no money of his own there. So, too, would a letter from him, referring to the power or the property, and accompanying a gift of money, which it stated to be in pursuance of the power, or out of the property. If a power exercisable by "writing" is executed by a will, such will is of course revocable, although no express power of revocation is reserved. *Lisle v. Lisle*, 1 Bro. C. C. 533.

Power exercisable by deed, instrument, or will.

If a life estate, with a power of disposition superadded, be given, without more, and no time is specified at which the power is to be exercised, it will be exercisable by deed or will. *Thomlinson v. Dighton*, 1 P. W. 149; *Ex parte Williams*, 1 J. & W. 89. But, *semble*, if the power is directed to be exercised, or the property to be divided, at the death of the donee, the power will be exercisable by will only. *Freeland v. Pearson*, 3 Eq. 658; *Kennedy v. Kingston*, 2 J. & W. 431; *Reid v. Reid*, 25 B. 469; and see *ante*, p. 41, *et seq.*

When no instrument specified.

A power, to be executed by one instrument, may, it seems, be executed by several assurances, which, although insufficient if taken singly, will operate together as one complete act; but in order to enable the Court to read the whole series as one assurance, such must be the intention of the parties on the perfection of the *first* assurance (Sug. Pow. 227); and see *Lord Braybrooke v. Attorney-General*, 9 H. L. C. 150.

By several assurances.

22. The distinction between common law powers and powers operating under the Statute of Uses is important with reference to their execution. For the same words,

Practical effect of distinction between

common
law and
statutory
use powers,
quâ their
execution.

purporting to be an execution of powers of different natures, may give the legal estate to different persons. Thus, if lands be limited to such uses as A. shall appoint, and A. appoints to B. and his heirs to the use of C. and his heirs, B., and not C., will take the legal estate. *Doe d. Worger v. Haddon*, 4 M. & R. 118. But if A.'s power had been a common law one—*e.g.*, if there had been a devise by a testator that A. should sell his lands, the same words of appointment would have vested the legal estate in C., for it seems clear that powers under wills operate in exactly the same manner as powers under other instruments operating by way of use. (Sug. Pow. 196.)

23. No technical words, however, are necessary to render the execution of a power effectual, if the intention be clear: and the instrument creating the power need not be recited. *Maundrell v. Maundrell*, 10 Ves. 246, 258; *Cleere's Case*, 6 Co. Rep. 17. "If the intention to execute the power be clear, it makes no difference that the donee does not refer to, or take the slightest notice of it: quia non refert an quis intentionem suam declarat verbis an rebus ipsis vel factis." (L. R. 2 Sc. & D. 223.)

24. The rule for deciding whether an intention to execute is shown or not, is thus stated by V.-C. Wood. It applies to cases where the donee of the power has no interest (see *post*, s. 47), and also to the execution of general powers by deed, and by will before the Wills Act (s. 39), and of limited powers, whether by deed or by will, both before and since the Act.

Requisites
to show
intention to
execute a
general
power by
deed or by

The Court always endeavours to carry the intention into effect, so far as such an intention can be gathered from the instrument itself: but the instrument must either refer to the

power, or to the property subject to the power ; or it must affect to deal with some property in general terms, not defining it, under such circumstances that it cannot have effect "except upon the property comprised in the power ; as, for instance, where a testator gives all his real estate, having no real estate of his own, but having only a power over real estate. *Brodrick v. Brown*, 1 K. & J. 332 ; *Hales v. Margerum*, 3 Ves. 299 ; *Andrews v. Emmot*, 2 Bro. C. C. 297 ; Sug. Pow. 201, 289.

will before
the Act ;
or a limited
power.

This is, of course, subject to the rules before stated relative to the execution of powers. The powers in the following cases either did not require any particular form of instrument, or complied with such requirements.

In *Fortescue v. Gregor*, 5 Ves. 553, A. had a power of appointment in favour of three children over a fund in Court. A petition was presented by one of the children reciting that A. was desirous that the fund in Court should be equally divided among the three children, and a third of the fund was accordingly transferred to the petitioner. This was held to be sufficient evidence of intention, no special form of appointment being prescribed. And see *Lee v. Head*, 1 K. & J. 651.

Recital in
petition
and pay-
ment out
of part of
fund.

In *Carter v. Carter*, Mos. 365, a statement in an answer in Chancery that a defendant had appointed, and did intend to appoint in due form, was held sufficient.

Answer.

In *Cunynghame v. Anstruther*, L. R. 2 Sc. & D. 223, both parents in one case, and the survivor in the other, took upon themselves and himself respectively an obligation on the respective marriages of their two daughters to

Recital in
a settle-
ment.

pay a certain sum. This sum was expressed to be accepted by the daughters "in satisfaction (amongst other things) of the share or division thereby allotted to her of her said father and mother's property settled by their marriage contract." The said marriage contract comprised funds, settled so as to belong ultimately to the children of the marriage, as the parents or the survivor of them should appoint, and in default to the children equally. It was held that there had been a sufficient reference to the power to show that the appointor meant to execute it by the settlement which contained such reference. And see *Wilson v. Piggott*, 2 Ves. 351; *Poulson v. Wellington*, 2 P. W. 533.

Bill.

A bill filed against executors to compel a transfer of a fund by a person to whom such fund had been left for life, with power to dispose of it by will or otherwise, has been held sufficient. *Irwin v. Farrer*, 19 Ves. 86. So, too, the presentation of a petition for payment out of Court of the fund. *Holloway v. Clarkson*, 2 Ha. 521; *Re David*, John. 500.

Change of
invest-
ment, and
power of
attorney
insuffi-
cient.

But where A. had a life interest in stock standing in the names of trustees, with a power of appointment over a moiety by will or otherwise, and she sold out the stock and reinvested it in her own name, she was held not to have thereby exercised her power. *Reith v. Seymour*, 4 Russ. 263. But in *Marler v. Tommas*, 17 Eq. 8, shares in an unlimited company were standing in the name of the trustee of a settlement on trust for the separate use of the wife for life, and after her death for her general appointees by deed or will. The husband died, and the trustee transferred the shares to the wife, and she executed the deed of transfer. This was held sufficient. Such a power would not be executed by giving a power of attorney, executed in accordance with the terms of the power, to transfer the money, for that would be to turn

an instrument of substitution into one of alienation.
Hughes v. Wells, 9 Ha. 749.

But there must be evidence of an intention to execute: a mere reference to or mention of the fund is not sufficient, although accompanied by a confirmation of the instrument containing the power.

In *Re Bringloe* (26 L. T., N. S. 58), A., being entitled under B.'s will to personalty, settled 3000*l.* thereout on C. On his own second marriage in 1823, he settled a further 2500*l.* on his wife for life, with remainder to the children of the marriage; and in default of issue, for his own general testamentary appointees; and in default of appointment, for his next of kin. A., by his will in 1824, after reciting that he was entitled to personalty under B.'s will, and that he had settled 3000*l.* thereof on C. and 2500*l.* on his wife on her marriage, confirmed the said settlement, and as to all the residue of the moneys to which he was entitled under B.'s will, he gave them on certain trusts. The testator died without issue in 1829 and his wife in 1869. This residuary gift was held not to be an exercise of the power of appointment created by the settlement in 1823: the 2500*l.* went, as in default of appointment, to A.'s next of kin, who were to be ascertained at his wife's death in 1869.

Intention
to execute
is neces-
sary.

25. The rule being that there must be a reference to the power, or to the property subject to the power, in order to show an intention to execute, the difficulty chiefly arises in ascertaining whether such intention has been displayed. (See *Harvey v. Stracey*, 1 Drew. 73, 115.)

Indicia of
intention
to exe-
cute.

There are various *indicia* which have been held to point to an intention to execute, or the reverse.

Thus, if the donee refer to the subject of the power in such a manner that, if it had been a gift of the testator's own property, it would be held to point to particular stock in his possession, it will be sufficient:

Reference
to subject-
matter.

but it will be otherwise, if the words would not amount to a specific gift.

In *Re David*, John. 495, a testatrix bequeathed "all the residue of my property to be found in the Three-and-a-Half per Cent. Reduced Bank Annuities (now reduced to Three-and-a-Quarter per Cent.) and all other property whatsoever and wheresoever." She had no stock of her own at the date of will, or at any time after, but had a limited power of appointment over a sum of Reduced Bank Annuities. This was held a sufficient reference. And see *Re Gratwicke*, 1 Eq. 177.

Identity of
amount of
legacies
and of
fund in-
sufficient.

But the circumstance of legacies being identical in amount with a fund subject to a power, and of the insufficiency of the donee's own property to answer the bequests given by the will, are not enough to raise more than a conjecture, and therefore not enough to form grounds of judicial determination. *Davies v. Thorn*, 3 De G. & Sm. 347; *Jones v. Tucker*, 2 Mer. 533.

Reference
to the
power.

General words of appointment will be a sufficient reference to a limited power if the donee have no other, and if the appointee be an object of the power. In *Re Teape*, 16 Eq. 442, a testator, having power to appoint to his wife the income of a sum of stock, gave all the property of which he might be possessed or be entitled to dispose, to his wife absolutely. He had no other power. This was held a sufficient reference to the power, although the gift was absolute, and the power authorised a life interest only. And see *Bailey v. Lloyd*, 5 Russ. 330; *Gainsford v. Dunn*, 17 Eq. 405; and *contra*, *Hope v. Hope*, 5 Giff. 13.

Reference
to all
powers in
general
terms.

But a reference to all powers in general terms has been held not to execute a special power of a peculiar nature, when the directions with reference to the appointed property were not consistent with the nature of the property subject to the power. In *Beamish v. Beamish*, Ir. R. 4 Eq. 120, A. was partner in a firm, the partner-

ship deed of which provided that it should be lawful for each partner to bequeath his share to any one legitimate male descendant of B.; and that if such descendant should at the death of the partner be of age, he should have power to elect whether he would become a partner or have the value of the share paid him by the other partners. If he was a minor, the executors of the deceased partner were to elect for him, and the minor was to have a further power of election within six months after attaining 21. A. made his will, by which he in no way referred to the partnership, and thereby devised, bequeathed, and in pursuance of every power enabling him, appointed the residue of his property to his son (an object of the power) if, and not unless, he should attain 21; if he should die under that age, then he devised, bequeathed, and appointed the same to persons not objects of the power. A. had no other power. The son was a minor at the date of A.'s death, and A.'s executors elected that the son should become a partner. The Court held that it was a question of intention, and not to be dealt with as an execution of a power. The power of nomination was not exercised; only the money value of the share was intended to pass, and therefore the executors could not elect.

It has been held by the House of Lords that a will, which purported to be made in execution of all powers, in fact executed two only out of three which the testatrix possessed. *Saward v. Macdonnell*, 2 H. L. C. 88. But Lord St. Leonards doubts the correctness of this decision: see *Sug. Prop. H. of L.* 502, 508; *Pow.* 295.

Reference to power, when testator has more than one.

But although a recital and formal execution of one power by a testator who has several is evidence of an intention to execute such one power only (*Attorney-General v. Vigor*, 8 Ves. 256), there may be other *indicia* which will show that the other powers were in fact intended to be executed, besides mere general words. In *Trollope v. Linton*, 1 S. & S. 477,

by articles made previously to the marriage of A. and B. his wife, an infant, A. had power to appoint B.'s real and leasehold estates among the children of the marriage. By other articles of the same date, his own real estates were settled to the use of himself for life, with remainder (subject to a jointure for the wife) to the use of his first and other sons in tail: and in default of such issue to such uses as A. should appoint. There were several children. A., by his will, recited the articles for the settlement of his own estate and confirmed them, and recited the power of appointment contained in them, and proceeded to devise to his wife part of the property comprised in her articles; and then, in exercise of the created power and of all other powers, appointed his own real estates and all other real estates over which he had a power of appointment to trustees on certain trusts. The will made no mention of the articles for the settlement of B.'s estate, but contained a direction that all persons claiming under his will should be bound by the doctrine of election to give effect to the dispositions thereof. The Vice-Chancellor held that the circumstance of the testator having recited his power of appointment over his own estate *in hæc verba*, and yet made a disposition inconsistent with that power, and the expression that all persons claiming under his will should be bound by election to give effect thereto, showed that he intended to execute the power reserved to him over his wife's estates. And see Sug. Pow. 293, 295.

Appoint-
ment of
Blackacre
does not
execute
power of
appointing
a charge
thereon.

But there must be some intention, either expressed or necessarily implied, to enable the Court to say that two powers have been executed when only one is mentioned. The execution of a power of appointing real estate will not generally show an intention to exercise a power of appointing a sum of money secured by a term on the same estate.

In *Farmer v. Bradford*, 3 Russ. 354, an estate subject to a term of years was limited to such uses as A. should appoint, and in default to him in fee. The trusts of the term were (in the events that happened) to raise 1000*l.* for A.'s appointees, and in default of appointment for B. A. by his will before the Wills Act devised the estate and gave all the residue of his property to C.: the will took no notice of the term. B. was held entitled to have the 1000*l.* raised for his own benefit.

The Wills Act has made no difference in this respect. In *Clifford v. Clifford*, 9 Ha. 675, A. had power to appoint lands in fee: he had also power to appoint a sum secured by a term in the same lands. A. appointed the lands to B. for life with remainders over, and made him residuary legatee absolutely. The sum secured by the term was held to pass under the residuary gift to B. absolutely, and not under the express appointment of the fee.

A reference to part of the subject or to some of many subjects of a power, will not be sufficient to make a will operate as an execution of a power where there is no other indication of an intention to execute it. *Hughes v. Turner*, 3 M. & K. 666.

Reference to one estate, when testator has power over two.

In *Lewis v. Llewellyn*, T. & R. 104, a testator had freehold estates of his own but no copyholds: he had also a power of appointment over both freeholds and copyholds. By his will he devised all his freehold and copyhold estates. The devise was held to execute the power over the copyholds, but not over the freeholds. As to the admissibility of evidence of what estates the testator possessed or had a power over, see *post*, s. 38.

If a testator show that he had the distinction between property and power clearly before his mind, a gift in general terms will not operate as an execution of such powers as are mentioned at the commencement of s. 24.

If distinction between property and power present to testator's mind.

In *Wildbore v. Gregory*, 12 Eq. 482, V.-C. Bacon said that a testator cannot be considered, by using the words "my property," to have intended to deal with property over which he had a limited power of appointment, when there was property of his own, to which the words, giving full effect to them according to the terms of the will (exclusively of the instrument which created the power), would apply.

But if there is a reference to the power, and the will purports to be made in pursuance of the power, it is not necessary to describe the property, but the expression "my personal estate" is sufficient. If a testator, possessing a power, say, "by virtue of a power I make my will," and then say, "I give all my money," this would be a sufficient execution. *Harvey v. Stracey*, 1 Drew. 113.

In *Evans v. Evans*, 23 B. 1, a feme coverte with a power of appointment among her children, by her will in 1848, which did not refer to the power or the property subject to it, purported to dispose of "the property and income I am now or may become possessed of." She then gave "her property" to her husband and children. She had property of her own to which the will might refer. It was held that she had not executed her power.

Between
general and
particular
power.

If a testator show that he has the distinction between a general and a particular power clearly before his mind, words applicable to the general power will not execute the particular power.

In *Butler v. Gray*, 5 Ch. 26, the testatrix by her will in 1845 expressed her intention to appoint among her children a fund, which by virtue of her father's will she had power to appoint among them. She then proceeded to appoint a portion only to them; and, after directing payment of her debts and legacies, gave to one of her children "the residue of the personal estate which belonged to her, or which she had any *general* power to

dispose of." It was held that, by this residuary bequest, the testatrix intended to deal only with what was her own property, and not with that over which she knew she had only a limited power of appointment.

Although the contrary has been held, it seems well settled that the mere fact that a fund subject to a limited power is appointed as part of a residue, for the purpose of paying debts, &c., and then in trust for the objects of the power, is not sufficient to prevent the Court from giving effect to the appointment. The contrary was held in *Clogstown v. Walcott*, 13 Sim. 523. In that case a testatrix, with a power of appointment among her children over stock, by her will in 1840, "by virtue of every power enabling her in that behalf," appointed all the property of or to which she was then or at the time of her death might be possessed or entitled or have power to dispose" to A. and B. on trust, after payment of her debts and funeral and testamentary expenses, to invest the residue for the benefit of her children. It was held that she could not have intended to exercise the limited power, because the only appointment contained in the will was of a residue after payment of debts and funeral expenses, to the payment of which the fund in question could not be subjected; and there were besides directions for investment which were inapplicable to the trust fund. This decision has not been followed in several late cases, but no case has yet come before the Court of Appeal.

Blending of appointed fund with a residue out of which debts are to be paid is not enough to negative intention to execute.

In *Ferrier v. Jay*, 10 Eq. 550, the facts were similar to those in the last stated case; and V.-C. Malins held that the limited power was well executed, saying, that by the rule *reddendo singula singulis*, it might well be supposed that the testatrix meant her debts to come out of that property which was her own, and the rest to pass to those who were the objects of the special power.

In *Cowx v. Foster*, 1 J. & H. 30, V.-C. Wood came to a similar conclusion; but *Clogstoun v. Walcott* was not cited.

In *Re Teape*, 16 Eq. 442, L. C. Selborne, sitting for the Master of the Rolls, followed *Ferrier v. Jay*. See, too, *Elliott v. Elliott*, 15 Sim. 321; *Re Harris*, W. N. 1872, 119.

What is a
sufficient
intention.

26. All that is requisite is an intention on the part of the donee that the fund shall pass to some one who is an object of the power. When that intent appears, and the only means which the person so intending possesses of giving effect to it is by an exercise of a power of which he is donee, then—though his mind is a mere blank as regards the power, though he has forgotten its existence, or never knew he had it—the law will presume that he must have meant to make use of the only means within his reach of achieving his expressed purpose. This is subject to one exception, which is theoretical rather than practical. When what we find is not merely the absence of a positive intention to exercise the power, but the demonstrated presence of a positive intention not to exercise it, then it will be held not to have been exercised, even though the intention to pass the subject is expressed. *Per L. J. Christian*, Ir. R. 5 Eq. 273.

The principle is, that the donee of the power having shown an intention that the property subject to the power shall pass, the mere expression that it is to pass in a particular manner shall not control the general intention that it shall pass at all events.

But there must be a clear intention that the property should pass—*i.e.*, an intention to do an act, which can only be done by the execution of the power. When the intention to do such act is clear, and it cannot be done except by executing the power (by means of any estate which the party possesses or otherwise), the law will

consider such an act an execution of the power. *Re Morgan*, 7 Ir. Ch. R. 18.

27. There is an important distinction between powers executed in favour of volunteers and those executed in favour of purchasers: the rule is that

Distinction between executions in favour of volunteers and of purchasers.

The onus of proving the intention to execute a power voluntarily is on the volunteer; but if the person alleging the execution is a purchaser, the presumption is in his favour.

In *Blake v. Marnell*, 2 B. & B. 38, n., Lord Redesdale says: "Where a person voluntarily executes an instrument which may have effect under a power to charge property, he must demonstrate that he meant to execute the power: but where a person acts for valuable consideration, he is understood in equity to engage with the person whom he dealt with to make the instrument as effectual as he has power to make it; and whenever that is done, according to all the cases (upon which I see nothing to raise a doubt), it shall have effect so far as the person who is to execute it has power to give it effect. But where the nature of the instrument is not according to the power, but demonstrates an intent to execute it, it shall have the operation of charging in the form in which the power allows it to charge."

Thus, in *Wilson v. Piggott*, 2 Ves. 351, the donee of a power of appointment among children was a party to his daughter's marriage settlement, which recited that she was entitled to 1000*l.*, part of the fund subject to the power, and to another sum, "both of which would belong to her husband," and the husband at the same time made a provision for the wife. This was held to be an appointment to her, the husband being a purchaser. Lord Alvanley said: "In this settlement he declares her

entitled to this sum, to which she could only be entitled by his appointment, and the husband makes a settlement in consideration of it. He could have compelled the father to execute a regular appointment; it is a covenant by the father." But where the instrument containing the recital is an apt one for the execution of the power, there seems no reason why such recital should not itself operate as an appointment without more. (And see Sug. Pow. 202.)

However, in *Minchin v. Minchin*, Ir. R. 5 Eq. 178, 258, A. and B. and the survivor of them had a power of appointing 1000*l.* among their children; B. had also power to appoint 4000*l.* among her children. B., by her will in 1842, recited both powers, and appointed 500*l.* to each of her eight daughters out of the two sums of 4000*l.* and 1000*l.* After B.'s death, a settlement was made on the marriage of one of her daughters, to which A. was a party. It recited the instruments creating the two powers, accurately distinguishing them, and that B. exercised both those powers by her will, and that C. was thereunder entitled to 500*l.*, that A. had agreed to settle a further sum in addition to and to be settled with the 500*l.*, and C. thereby assigned the said 500*l.* to trustees. B.'s will was not a valid execution of the powers, and was set aside by the Court. The Lord Chancellor O'Hagan, affirming the Master of the Rolls, held that the recital in the settlement did not operate as an appointment by the father. The Lord Chancellor said that the purpose to convey the 500*l.* was the daughter's; the act of conveying it was exclusively hers. The father could not have intended to convey that over which he believed he had no control: he did not take any part in the act of conveying it. He was a party *diverso intuitu*, and there seemed to him no valid ground for imputing to the father a purpose which undoubtedly in fact was foreign

to his mind, because of an act which was his daughter's only, and not his at all.

The L. J. Christian dissented (see his judgment, p. 269). He thought that all the statements in the settlement regarding the daughter's fortune, whether by way of recitals of facts or assertions of right, were to be imputed to the father, in the sense of his having participated in the making of them. He was an executing party to the deed; he was identified with the daughter, not only in the formal framework of it, in which they made but one party, but in sympathy, in purpose, and in interest. He, even more than she herself, was to be looked to for the truth and honour of the representations which were made regarding her fortune to the man who was about to marry her. It is of course clear that there was ample consideration. He further thought that the settlement displayed two intentions. There was, first, the general and leading intent, which was one of substance and of merits, viz., that the daughter should have out of the two funds 500*l.* as part of her fortune and as part of the consideration for the jointure which was being settled on her; there was, secondly, a particular and special intent or supposition, which was one of mere form and conveyancing, viz., that the particular instrument through which she derived that right was the will of the mother, as an exercise of the power. But that was a mistake; the will had no such effect, and gave her no right at all. But the father possessed that very same power, an exercise of which was all that was needed for instantly effectuating the first and general and leading intent, and which exercise lay clearly within the scope and function of the settlement.

The Lord Justice's reasoning seems more consistent with principle and authority than the actual decision. It is true that the father expressed no intention to appoint;

but the same was the case in *Wilson v. Piggott*. The only distinction between the two cases would appear to be that in *Wilson v. Piggott* the father could not have supposed that his daughter had any title at all, unless by his appointment; in *Minchin v. Minchin* the father thought the daughter had a complete title independently of him. (See *post*, s. 29.)

But there will be no presumption in favour of an intention to appoint if the instrument be purely voluntary, as a will. In such a case the onus of proving the intention lies on the person claiming to be the appointee. *Pennefather v. Pennefather*, Ir. R. 7 Eq. 317. (See the case stated in the next section.)

Clear in-
tention
requisite.

28. And there must be in all cases a clear intention to deal legally with the fund. The jurisdiction of the Court is to supply defects occasioned by mistake or inadvertence, not to supply omissions intentionally made.

In *Garth v. Townsend*, 7 Eq. 220, the donee of a power of appointment among her children, by deed, or will, or writing purporting to be or in the nature of her will, left a signed but unattested memorandum in an envelope addressed to her son. "For my son and daughters. Not having made a will, I leave this memorandum, and hope my children will be guided by it, though it is not a legal document. The (funds) I wish divided as follows (amongst her children). This paper contains my last wishes and blessings upon my dear children, and thanks for their love to me." This memorandum was held to show no intention to execute the power, and consequently the Court could not remedy any defects in execution so as to give it validity as an appointment.

In *Pennefather v. Pennefather*, Ir. R. 7 Eq. 300, lands were vested in trustees for a term of years, on trust to raise 4000*l.* for the children of the marriage, payable as A.,

and in default of appointment by him, as his wife should appoint by deed or will, and in default of appointment by either, among the children equally. A., by will, directed all his lands, including those comprised in the term, to be sold, and out of the produce gave portions to his five sons, and 1000*l.* each to three of his daughters. By codicil he gave 1000*l.* each to his two remaining daughters, and added :—"I hereby direct that no part of the produce of my lands shall be paid to any of my sons until the said sums of 1000*l.* each shall have been paid to each of my said five daughters, or 5000*l.* among the survivors of them, *over and above and in addition to the equal distributive share of the 4000*l.* mentioned in my marriage settlement, which each of them are entitled to.*" The Court of Appeal, reversing the judgment of the Vice-Chancellor, held the power not executed ; the words were not unmeaning, for they excluded any question of satisfaction or election.

The Lord Chancellor said (p. 310) :—"It is important to observe that in all the cases in which intention to execute the power has been presumed in the absence of specific reference to it, the intention on the part of the donee to pass the property or do an act with reference to it, operative under the instrument which he signs, has been clearly indicated. He must intend himself to make the gift which is to be validated by implication.

In *Adams v. Adams*, 1 Ha. 540, the Vice-Chancellor says :—"Where a testator in one part of his will has recited that he has given a legacy to a certain person, but it has not appeared that any such legacy was given, the Court has taken the recital as conclusive evidence of an intention to give by the will, and fastening upon it, has given to the erroneous recital the effect of an actual gift. Where, however, the testator says that only which amounts to a declaration that he supposes the party who

Parallel
case of
legacy.

is referred to has an interest independent of the will, such a recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication." The distinction between the two cases is obvious. In the former, the erroneous recital is evidence of an intention to give by the will, inadvertently not expressed. In the latter, as is observed by Mr. Jarman, "such recitals do not in general amount to a devise; for as the testator evidently conceives that the person referred to possesses a title independent of his own, he does not intend to make an actual disposition in favour of such person."

29. From the principles stated in the last section, the Lord Chancellor deduces a rule as to powers, which may be thus stated:—

Distinction
between
recitals
showing
that ap-
pointor
thought
he had
appointed;
and that
he thought
appointee
was en-
titled.

If the donee of a limited power of appointment recites that he has appointed, and does no more, this erroneous recital will be evidence of an intention to execute the power.

If, however, he recites that an object of the power is entitled to the property subject to the power, he evidently conceives that the person referred to possesses a title independently of any act of the testator's, and he cannot, therefore, be held to express by such recital an intention to exercise a power disposing of property which he has already declared belongs to the objects independently of him.

It has accordingly been held that where a power of appointment was given to A. and B. jointly and to the survivor of them, and A. purported to exercise the power in favour of C., an object, and died before B., a recital in C.'s marriage settlement, to which B. was a party

that C. was entitled to part of the fund under A.'s appointment, did not amount to an appointment by B., although he was then sole donee of the power, and the settlement was an apt instrument for the appointment, and although the husband of C. made a settlement in consideration of the supposed validity of the appointment. *Minchin v. Minchin*, Ir. R. 5 Eq. 178, 258 (but see *ante*, s. 27).

If, however, the donee of the power has himself done some act which in itself would not be sufficient to operate as an execution of the power, and then by an instrument capable of executing the power recites or states that the donee is thereunder entitled, this will amount to an execution of the power. In *Lees v. Lees*, Ir. R. 5 Eq. 549, funds were settled by marriage articles on trust for A. during the joint lives of himself and B., with an ultimate trust to the use and behoof of the issue of the intended marriage if more than one, as A. should appoint. A. transferred part of the funds into the names of himself, B., and a child; and by his will, after referring to "all sums in his lifetime advanced to or secured for" his children, directed conversion and division of his whole property on B.'s death, the sums advanced to be brought into hotchpot; he then gave a list of sums so advanced, and in it included the part of the trust fund transferred into the names of himself B. and their child: this was held sufficient. Cf. *Morgan v. Gronow*, 16 Eq. 1.

30. As a necessary consequence of the principles above stated, a power will not be held to be executed, contrary to the expressed intention of the donee, although it be clear that he acted under a misapprehension in making use of such expression. (See *ante*, s. 26.) In *Carver v. Richards*, 27 B. 496, the Master of the Rolls, after saying that it is the intention which governs in these cases, proceeds thus: "I admit that this leads to very nice dis-

If the invalid appointment be made by the donee himself.

Powers are not executed contrary to express intention.

tinctions, and that it may very often be extremely difficult to distinguish or define the limits between an intention not to execute a power and the case of no knowledge of the existence of the power, in which case, strictly speaking, there is no intention to execute it, whilst in the former there is an intention not to execute it. The facts from which such intention and absence of intention are to be inferred may very often run near to each other, and possibly lead in some cases to very nice and perhaps technical descriptions; but the principle appears to me to be clearly established by the cases."

In *Langslow v. Langslow*, 21 B. 552, funds were vested in trustees in trust after the death of A. and B. for the children, grandchildren, or other issue of A. and B. as they or the survivor should appoint, and in default, for all the children equally; the hotchpot clause was applicable as between children only. An appointment by deed was made to one son, and another son died, leaving a son. A. survived B., and by will, which recited that the son could be obliged under the hotchpot clause to bring in the share appointed to him, proceeded: "and then as I make no further appointment, the whole settled fund will be equally divided between him and my little grandson." This was held to be no appointment. It might be said that if he had understood what the effect would be, he would have made an appointment; but this would admit that there was no appointment.

What is sufficient to make an execution of one power operate as the execution of another.

31. We have seen (s. 26) that if the intention to pass the property is clear, the power by which alone it can pass will be held to have been executed, although another is referred to, but the rule is that—

In order to enable the Court to say that one power has been executed when another pur-

ports to have been, there must be sufficient words to amount to an execution of the first power.

If, therefore, the words be referable to a non-existing power and no other, such an appointment would fail altogether; but if there are general words of appointment sufficient to execute the valid power, in addition to the words executing the invalid power, as a general rule, the intention to pass the property will prevail, and the mere mistaken supposition of the appointor that the property would pass by virtue of a power other than that by which he expresses his intention to pass it, will not be held to exclude the possibility of its passing under the general words, *ut res pereat*.

In *Bruce v. Bruce*, 11 Eq. 374, A. had power to appoint real estate among the children of the marriage, to whom it was limited in default of appointment. By an invalid assurance A. purported to destroy this power and confer on herself a general power. By her will, without reference to her special power, but in exercise of her supposed general power and "every other power enabling her in that behalf," she appointed the lands to her children and others. This was held a good execution of the special power so far as it was made in favour of the objects thereof. The Master of the Rolls said that he considered it to be a rule applicable to the execution of powers, that a power will not be deemed to be executed contrary to the intention of the donee of the power, when the donee supposes that a different power from that assumed to be executed is vested in him. But there is no doubt that the Court will, in order to give effect to the intention of the donee of the power for that purpose, aid the execution of a power not specially referred to, though such power was not present to the mind of the donee at the

time of the execution. If, however, the execution purported to be of an entirely different power, *e.g.*, if it were joint instead of single, and applied to a term of years created for a different purpose, or operated on a fund of different quantity, which had a different destination in default of appointment, it would be otherwise. *Hamilton v. Royse*, 2 S. & L. 315, 321. And if a man has both an express and an implied power, and he mentions and purports to execute the former, this will not be an execution of the latter. *A. G. v. Vigor*, 8 Ves. 256.

Fund in-
sufficiently
appointed,
may be re-
appointed.

32. Questions have arisen whether there can be a valid re-execution of a power in cases in which the original execution has failed either from fraud or from some other defect; in the latter case, it seems clear that it may be validly re-executed: "Supposing a power to have been improperly executed, and then the parties execute it properly, there is no doubt that the law would look upon the first execution as null and void, and that it might be exercised over again." Per Lord Hardwicke in *Hervey v. Hervey*, 1 Atk. 567. And this was in fact decided in *Ward v. Tyrrell*, 25 B. 563, where the donee of a power of appointment among a class appointed exclusively to some of the class, and a bill was filed to set aside the appointment: the appointor then appointed in a different manner, but declared that such second appointment should be good only in case the first was set aside. The second was held good. It makes no difference, *semble*, if the execution has failed by reason of its being a fraud upon the power. It seems that if there were first a fraudulent appointment of part of a fund, and then a general appointment, before any steps had been taken to set aside the former appointment, with words sufficient to carry the fraudulently appointed fund, the latter may be upheld as to the whole fund. But if the fraudulent appointment were set aside, although the appointor has

Fund
fraudu-
lently ap-
pointed.

theoretically the power to appoint that share again, if he appoint to the same person, the difficulty of showing that the second appointment is free from the fraud which vitiated the first is so great as to be almost insuperable.

In *Carver v. Richards*, 27 B. 488, 1 D. F. & J. 548, A., in 1813, exercised her power of appointing among her children certain estates, including L., by appointing to her eldest son absolutely. This appointment was made on a bargain that the estates should be settled subject to A.'s life estate, to the use that her husband should receive a rent-charge for his life, and subject thereto to the use of the children of the marriage as A. and her husband should jointly appoint, or as A., if she survived, should by deed or will appoint; and the estates were so settled accordingly. In 1820, a joint appointment was made among the children, the L. estate being given to the eldest son; in 1826 slight variations of these appointments were made; on each occasion a power of revocation and new appointment was reserved to them jointly, or to A. if she survived. In 1827 the husband died. In 1829, the widow, by a deed, not noticing the invalidity of the appointment of 1813, and expressed to be made in exercise of the powers given her by the deeds of 1820 and 1826, or by the deeds recited in them, and of all other powers vested in her, made some slight variations of the dispositions of the deeds of 1820 and 1826, and subject thereto confirmed them. The original power was held well executed by the appointment of 1829. In this case there were apt words of general appointment, but it is clear that the appointor thought herself to be executing a totally different power from that under which the estate was held to pass; there were sufficient words, however, to enable the Court to say that the valid power was in each case executed. But there may be cases in which appointments made under a power well

Where execution is void for fraud, but further appointment is sufficient to cover all the estates.

created might be held bad, if made also under a power badly created. What is vicious may so far predominate over what is good, or the vicious and the good may be so mixed together, that the Court cannot give effect to the one and reject the other. In *Curver v. Richards*, the intention was to distribute the property in the manner pointed out by the deed of 1829, and what was vicious in the mode of carrying out that intention was so far separable from the good, that the intention was held to prevail. (1 D. F. & J. 566, and see *Birley v. Birley*, 25 B. 299.)

33. It has been said that there must be some expression of an intention to execute the original power, for that the Court cannot hold that a power, which the donee thereof has once purported to execute (but which execution has failed), is executed by a subsequent instrument, in the absence of all expression of any intention to execute.

A power once badly executed will not be well executed if there be no intention to execute.

In *Jackson v. Jackson*, Dru. 90, where a father had a power of appointment among his children and exercised it by an appointment to his son, which was vitiated by a bargain for his own benefit, and subsequently inherited the estate as his son's heir, and disposed of it by his will in 1821, L. C. Sugden said that as all the circumstances of the case led him to believe that the father must have considered the power as not in existence at the date of his will, he was excluded from the possibility of attributing to him any intention of then executing it. He says, "It is clear upon the authorities, that if a man exercise a power improperly so that his execution of it is void, and he subsequently discovers his error, he may then exercise the power in the manner warranted by law. But in this case, there is this difficulty, that the father never retracted: he never desired to impeach the appointment, nor ever disclaimed it." It is to be observed that the father merely devised his estate and interest: there

were no words purporting to execute any power. But Lord St. Leonards' remarks would seem to imply that it was his opinion that if a power be improperly executed, the execution must be retracted before the original power can be validly executed. It seems, however, from the cases above cited, that all that is requisite is an expressed intention to pass the property, the subject of the power, and apt words to execute the power.

In *Askham v. Barker*, 12 B. 499, a power of appointment among children was executed by a father on a bargain for his own benefit; he afterwards executed another appointment, reciting the previous one, and his desire of appointing such of the premises as remained unappointed, and appointing all the funds not comprised in the previous appointment, "and all other the sum and sums of money, messuages, lands, tenements, and trust estates whatsoever, comprised in or affected by the said recited indenture of settlement over or upon which he had a power of appointment or disposal." The Master of the Rolls said that the second execution was tainted by the fraud of the first execution, and was not valid and complete; the father was embarrassed by what he had previously done, which he thought and intended to be an execution of the power; he proceeded on that footing, and although he had used words which would have an operative effect if that power had never been previously attempted to be exercised at all, yet his reference to the power was clearly as if it had been previously executed.

Nor if the second execution be tainted with the fraud of the first.

And in *Farmer v. Martin*, 2 Sim. 502, A. had a power to appoint 10,000*l.* among his younger children. In 1794, he appointed the whole sum to his two daughters, reserving a power of revocation; in 1804, he appointed 5000*l.* to the said two daughters irrevocably; in 1806, he appointed the other 5000*l.* to Eleanor on a bargain,

which made it corrupt; in 1819, by deed reciting the appointment of 1806, he revoked (with Eleanor's concurrence) the appointment of 2500*l.* to her, and appointed that sum to Ann, another object of the power, but provided that nothing therein contained should render void the appointment of 1806 to Eleanor. It was held that both the appointments to Ann and to Eleanor were void, partly on the ground that the whole appointment was so intermixed with that of 1806 that it could not be sustained; and partly because it was intended to be an execution of a power which the parties supposed to exist, but which did not in fact exist.

Lord St. Leonards doubts the authority of this case (Pow. 355), and see *Irwin v. Rogers*, 12 Ir. Eq. R. 159.

When the first appointment has been set aside.

If the first appointment has been actually set aside by the Court, it is very difficult for the donee to make a valid re-appointment to the same person. In such a case, the burden of proof requisite to support the second appointment rests on the appointee. The reasons which in the case of a dealing between a solicitor and client throw the onus of proof on the solicitor, between a trustee and a *cestui que trust* on the trustee, between a parent and child on the parent, and in the class of cases to which *Huguenin v. Baseley* (14 Ves. 273) belongs, on the persons seeking to sustain the gift, apply with equal force as between the appointee in such a case and the persons entitled in default of appointment. (*Topham v. Duke of Portland*, 5 Ch. 40.) In that case, an appointment made to H., an object of the power, was set aside as fraudulent, by reason of an antecedent agreement between the appointor and appointee: the appointor then appointed to H. again, and she and the appointor deposed that there was no agreement between them as to the disposition of the fund; but the appointment was set aside. L. C. Hatherley said that he gave implicit

credence to the statements of the appointor and appointee: he also thought that it would be difficult to hold that H. had placed herself in such a position as to incapacitate herself under any circumstances from accepting a gift of the whole fund: he thought that a valid appointment might have been made to her of the fund, but the real point for consideration was, whether or not, though now conscious of her strict right at law to dispose of the fund, the pressure of a moral obligation not to appropriate more than one-half of it to her own use, and to hold the other half subject to the appointor's intentions and for his purposes, did not at the date of the last appointment and still weigh on her mind with such force as to convert her into a mere passive instrument of the appointor's intentions, and whether such her sense of moral obligation was not well known to the appointor; and if so, whether he had taken any step to discharge her from it, and restore her to complete freedom of action?

34. Although the mere expression of a desire to confirm an invalid appointment will not establish it, yet if the appointor, having made an appointment which was, at the time of making it, invalid, afterwards does not merely express a desire to confirm such appointment, but proceeds to do so by way of appointment, then, if events have since happened which render such an appointment unobjectionable, it will be upheld.

Confirmation of void appointment by re-appointment, when events have made it possible.

In *Morgan v. Gronow*, 16 Eq. 1, an antenuptial settlement contained the usual power of appointment among children. The husband, who survived, exercised it by appointing on such trusts, to take effect after the marriage of his daughter E., as she should appoint, and in default for her for life, with remainder as she should appoint by will. E. was unmarried at the time, and the appointment was therefore invalid. (See *post*, "Excessive

Execution.”) The donee of the power, after E. had married, executed a deed which recited his desire to confirm, and did actually confirm the appointment. This was held good: the deed showed on its face a desire to confirm by an execution of the power: there was an intention to confirm, coupled with an express declaration that such confirmation was made by virtue and in execution of the power.

Execution
of powers
of revoca-
tion.

35. The same principles that apply to powers of appointment apply equally to powers of revocation: if therefore a man has power to revoke existing uses and limit new uses, and he afterwards by will devises all his lands having no others than those subject to the power of revocation, they shall pass. (*Deg v. Deg*, 2 P. W. 415.) But an appointment expressed to be made in exercise of every power enabling the appointor does not extend to property which the appointor cannot appoint without the exercise of a power of revocation, if there be other property to which the words of appointment can apply. (*Pomfret v. Perring*, 5 D. M. & G. 775.) The principles acted on in other cases with respect to the exercise of powers apply to cases of this sort. If a person has an interest in one subject and a power over another, and uses general words of disposition only, those words will not operate as an exercise of the power. It is otherwise when he has no interest but only a power. The same principle must apply to a case where a person has a power of appointment and also a power of revocation and new appointment. The general words of appointment ought not to be held to be an exercise of the power of revocation. If there was no power except one of revocation and new appointment, it would be different, and the general words would then be held to be an exercise of the power. (*Ibid.*)

Intention

If the intention to revoke in all events be clear, it

makes no difference that the appointees substituted in place of the original appointees cannot take.

to revoke
in all
events.

In *Quinn v. Butler*, 6 Eq. 225, a testator, having power to charge real estate with 7000*l.* to be distributed among his younger children as he should direct (but not exclusively), and in default of appointment among them equally, by will charged the said real estate with the 7000*l.* and directed that 4000*l.*, part thereof, should be paid to his younger son, and the remaining 3000*l.* to his three daughters equally. He had no other younger children. By a codicil he revoked the appointment or charge of 7000*l.* made by his will, and charged the same hereditaments with the payment of 7000*l.* to the younger son alone. The Master of the Rolls said, "The whole question depends on the intention of the testator. If a will is simply revoked in order to make a gift in favour of another person, and you can see that there is no intention to revoke unless for that purpose, then the doctrine of *Onions v. Tyrer* (1 P. W. 343) applies" (*i.e.*, *cessante ratione revocandi cessat ipsa revocatio*). But it will be otherwise if the intention be to revoke in any case. In *Quinn v. Butler*, there could be no doubt that the intention was to revoke the will altogether. The codicil was an absolute and positive revocation of the charge: then there was a new charge of 7000*l.*, and the whole of that was given to the son, and was therefore invalid. The case is in fact analogous to those in which a testator says by codicil that the legatees named in his will shall not receive anything, but that the fund shall be given to another object; there, although the latter cannot take the gift, the Court cannot speculate on whom the testator might have wished to confer the benefit in such an event. (*Tupper v. Tupper*, 1 K. & J. 665.)

But if the words of the clause reserving the power of revocation extend by necessary grammatical construction

Extent of
revocation.

to some only of several appointments made by the same instrument, a subsequent execution of the power will not revoke all the appointments made by such instrument. In *Morgan v. Gronow*, 16 Eq. 1, the donee of a power of appointment among children executed a deed in which he recited certain former appointments, and his desire to confirm them, and he accordingly thereby confirmed them: he then "directed and appointed" the devolution of other parts of the same fund; and he reserved a power to revoke "the direction and appointment" thereby made. He afterwards exercised this power. Lord Selborne held that, although the words of confirmation had been already held by him to operate in substance by way of re-appointment, yet as the deed, so far as language and phraseology were concerned, distinguished between the two operations, the one being on the face of it called confirmation, the other direction and appointment, the power of revocation was meant to refer to what had been done in terms by way of direction and appointment, and not by way of confirmation. (As to the execution of powers of revocation by a general devise since the Wills Act, see *post*, s. 41.)

Revocation
of wills
executing
powers, by
subsequent
will.

36. In *Freeman v. Freeman*, Kay 479, 487, V.-C. Wood says that "if there were a power to appoint by will, and if a good appointment were made by a will which referred to the power and contained other devises, and if subsequently there were another will, declared to be the party's last will, giving all his real estate and not revoking any previous instrument, he thought it would be extremely difficult to hold that the actual appointment made by the first will was in effect revoked."

Now the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together;

for though it be a maxim that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, so as they be all clearly testamentary, may be admitted to probate as together containing the last will of the deceased. If a subsequent testamentary paper be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent. (Williams on Executors, 6th ed., 156. As to the expression "last will," see *Pettinger v. Ambler*, 1 Eq. 510—515. In *Leslie v. Leslie*, Ir. R. 6 Eq. 332, these words are said to be of no weight whatever. In *Freeman v. Freeman*, 5 D. M. & G. 704, they were held not to amount to a revocation of a former will, without words to that effect, as regarded real estate, though L. J. Turner seemed to think that it would be different as to personalty. In *Leslie v. Leslie*, however, the property was personal.)

It would appear therefore that if, in the case put by V.-C. Wood, the power was a limited one, the subsequent will would have no effect on the appointment made by the prior will, whether before or after the Wills Act. In *Freeman v. Freeman*, the will was before 1838.

But if a man, since the Wills Act, seised in fee of Blackacre and with a general power of appointment over Whiteacre devises and appoints all his estates to B., and afterwards, without expressly revoking his former will, devises, but does not appoint, all his real estate to C., it seems that C. would take both Blackacre and Whiteacre.

In such a case, the Court of Probate would probably grant probate of both instruments, in order to enable the Court of Chancery to determine the question of the execution of the power. In *the Goods of Fenwick*, L. R. 1 P. & D. 319.

In *Shiel v. O'Brien*, Ir. R. 7 Eq. 64, a testator made a will by which he divided amongst his children all his own property, and also property over which he had a power given him by his marriage settlement (it does not appear whether the power was general or limited). He afterwards made another will, which contained no words of revocation, by which he fully disposed of his own property but not of that over which he had a power of appointment. The two wills were made in paragraphs, and the latter appeared to be in many respects a copy of the former: the Court admitted the latter only to probate. The effect of this was to make the subsequent will, which contained no words of revocation or appointment, operate as a revocation of the appointment contained in the first will: the decision, however, rests on the peculiar circumstances of the case. And see *Lemage v. Goodban*, L. R. 1 P. & D. 57.

Wills in execution of powers not revoked by mere words of revocation without new appointment.

It is a general rule that appointments made by wills in execution of powers are not to be revoked by mere general words of revocation of all former wills without appointment.

This is clearly distinguishable from such a case as that suggested by V.-C. Wood, where there were no express words of revocation or appointment, but, by virtue of the 27th section, a fresh appointment.

Before the Wills Act a general clause, revoking all former wills, was not sufficient to manifest an intention to revoke a will made in execution of a power. In *the Goods of Merritt*, 1 Sw. & Tr. 117, per Sir C. Cresswell.

And the law is the same since the Wills Act: the 27th section was intended to enlarge powers of disposition and has no bearing on questions of simple revocation. (*Ibid.*) In that case the power was a general

one, and was expressly exercised by the first will, which referred to it. The second will contained express words of revocation, but did not contain any clause that could be taken to operate as an execution of the first power: the effect of admitting the second will would have been to decide that the testatrix had declined to execute her power.

Before the Wills Act, a woman's will was revoked by her marriage, except in some cases of wills made in execution of powers (*Logan v. Bell*, 1 C. B. 872, and 3 M. & K. 381); a man's by marriage and the birth of issue. Revocation
by mar-
riage.

By 1 Vict. c. 26, s. 18, it is enacted that every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next-of-kin under the Statute of Distributions.

But a will made in execution of a power of appointment is not revoked by a subsequent marriage, when in default of appointment the property of which it disposes passes under the settlement containing the power, although the same persons would take under such settlement as would have taken in case of intestacy under the Statute of Distributions. *In the Goods of Fenwick*, L.R. 1 P. & D. 319.

Nor is such a will revoked by a subsequent marriage, when, in the event of certain contingencies happening, the property thereby appointed will not, in default of appointment, pass to the persons who would have taken in case of intestacy under the Statute of Distributions (*ibid.*).

A will under a power will be revoked by any act

N

amounting to a revocation in law of a proper will. Sug. Pow. 458; *Reid v. Shergold*, 10 Ves. 370.

Ademption
of appoint-
ments.

An appointment under a power may be adeemed in the same manner as a specific devise or bequest; and if the appointor aliens the property subject to the power, he is to that extent to be taken to revoke his appointment. (As to the law before the Wills Act, see Jarm. Wills, i. 122, and see now 1 Vict. c. 26, s. 23, which enacts that no conveyance or other act subsequent to the execution of a will relating to any real or personal estate therein comprised, except a revocation, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.)

In *Gale v. Gale*, 21 B. 349, A. had power to appoint the reversion in fee of settled estates, and the trustees had a power of sale with A.'s consent. A. by his will appointed the estate to trustees on trust to sell and hold the proceeds for the benefit of certain persons named; and he gave all his estate, "not thereinbefore specifically disposed of," to his widow. The estate was sold in A.'s lifetime. The appointment was held to be adeemed, and the proceeds passed by the residuary gift to A.'s widow. And see *Collinson v. Collinson*, 24 B. 269; *Arnald v. Arnald*, 1 Bro. C. C. 401. Lord St. Leonards (Pow. 310) disapproves of the decision in *Gale v. Gale*: he considers that the power of appointment in A. was not destroyed by the execution of the power of sale: it was merely transferred to the property in its new state.

In *Cooper v. Martin*, 3 Ch. 47, an estate was devised on trust for sale, with power of pre-emption for the testator's younger children, and the proceeds were to be held on such trusts in favour of his children as A. should appoint before a certain period. L. C. Cairns thought that an

appointment of the estate *eo nomine* would have carried the proceeds of the sale of the estate if it had been necessary to sell it.

A will is revoked by a subsequent defective execution of the power, if the defect be such that equity can aid. *Cotter v. Laver*, 2 P. W. 624.

Revocation
by invalid
appoint-
ment.

But it will not be revoked by an absolutely invalid appointment. In *Eilbeck v. Wood*, 1 Russ. 564, a married woman, donee of a power of appointment by will, duly made her will in execution thereof; she afterwards purported to appoint the property by *deed*: this appointment being absolutely void, was held not to be a revocation of the will. And see *Ford v. De^r Pontes*, 30 B. 572.

37. The Wills Act, s. 27, has introduced an important alteration in the law relating to appointments by will, but the section applies only to general powers. The law before that Act is thus stated by Lord St. Leonards in *Lake v. Currie*, 2 D. M. & G. 547: "It is clearly settled that a general devise or bequest will not, independently of the Wills Act, operate as an execution of a power; but it is also settled (*Roake v. Denn*, 1 Dow. & C. 437; *Grant v. Lynam*, 4 Russ. 292), that where a testator disposes of *real estate*, not having any other than what is subject to the power, he is in such a case to be taken as dealing with that estate; and that both as to realty and personalty, if the Court is satisfied, by the manner in which the particular property is referred to, that the testator intended to deal with that property, the disposition will be a valid execution of the power. . . . The intention of the Statute of Wills was to extend, and not to narrow, the operation of devises. It is now absolutely necessary to show a contrary intention to exclude the execution of the power, while under the old law it was needful to show the intention to execute the power."

Powers
executed by
will :
General
devise or
bequest.

The statute, s. 27, practically abolishes the distinction

between property and power for the purpose of devises and bequests, so far as general powers are concerned, but it does not touch limited powers : the law, therefore, is the same as regards the execution of limited powers generally, and of general powers before the Act. This has been already considered, *ante*, s. 24, *et seq.*

Evidence
of state
of testator's
property,
when ad-
missible.

38. There is, however, an important distinction between testamentary gifts of real and of personal estate, which applies to cases where the testator had (before the Act) a general power, and both before and since the Act, a limited power ; in the latter case, the beneficiary must of course be an object of the power or the question cannot arise : the rule is this :—

In a gift of real estate, the Court may examine whether the circumstances of the testator's property are such as to give effect to the will : in a gift of personalty, the Court cannot look beyond the will.

“Whatever is the inadequacy of a testator's property to satisfy the terms of the will, and whatever may be the conviction of the Court of his intention to execute the power, the state of his personalty at the time of the will or the death cannot be examined for the purpose of collecting evidence of his intention.” *Jones v. Curry*, 1 Sw. 66 ; *Jones v. Tucker*, 2 Mer. 533 ; *Lovell v. Knight*, 3 Sim. 275 ; *Lemprière v. Valpy*, 5 Sim. 108 ; *Standen v. Standen*, 2 Ves. 589, 6 Bro. P. C. 193. This last case establishes an exception, and decides that if there is a power of appointing both real and personal estate, general words may extend to the whole gift, so as to make it include both realty and personalty, if such be the intention. In that case, the testatrix had no real estate of her own ; this fact, which was admissible in evidence

according to the rule last stated, showed her intention to execute her power, and that when she talked of her real estate she meant the real estate in the power, and the same intention was held to govern the entire gift. (Sug. Pow. 338.)

It seems doubtful whether the fact that the donee of the power is a married woman makes any difference. The cases are conflicting: it has been said (9 Sim. 451) that a married woman, having no testamentary capacity, can have nothing in view in making a will but to execute a power. And this view was adopted by V.-C. Stuart in *Attorney-General v. Wilkinson*, 2 Eq. 816. In that case a testatrix, having by her marriage settlement power by will or deed to appoint a certain sum of stock, by her will dated 1822, and not referring in terms to the power, gave "all her property and estate whatsoever and where-soever, and of what nature, kind, and quality soever, the same might be," to her husband absolutely. The Vice-Chancellor held this a good execution of the power. He said that the property subject to the power proceeded entirely from the testatrix (it was a fund brought into settlement by her on her marriage), and although her will did not refer to the power, it could have no operation at all unless treated as an execution of the power. Although the words of the will did not mention the particular fund which was subject to the power, as it did not appear that she had any other property, there was none other on which the will would operate. This decision seems to establish a new rule, viz., that in order to prevent the will of a married woman from operating as an execution of a general power before the Act (and by parity of reasoning, of a limited power since the Act) the persons denying the execution must show that she had other property on which her will could operate. This appears opposed to the cases cited above (*Lovell v.*

Is there any difference in the case of a married woman?

Knight, 3 Sim. 275; *Lemprière v. Valpy*, 5 Sim. 108; *Churchill v. Dibben*, 9 Sim. 447, n.; *Curtis v. Kenrick*, 9 Sim. 447); and it may be doubted whether there is any real reason for making a distinction between wills of married women and those of other people; for a married woman has not an absolute testamentary incapacity: she may have separate estate; of this she can certainly dispose by her will: and she may also make a will with her husband's concurrence.

Wills Act,
s. 27.
General
power exe-
cuted by
general
words of
gift.

39. By s. 27 of the Wills Act it is enacted: "That a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

It has been held (*Re Spooner*, 2 Sim. N. S. 129) that the words, "I constitute A. B. my residuary legatee," mean the same thing as "I give all the rest and residue of my personal estate to A. B." And for an example of a residuary gift not within s. 27, see *Wilkinson v. Schneider*, 9 Eq. 424. A power to appoint in any manner the donee may think proper is a general power (*ante*, p. 7); it means in effect a power to appoint to any person. But a power

exercisable by will only is within the Act; and in the absence of a contrary intention it makes no difference that the persons who take in default of appointment are the residuary devisees or legatees; they take *prima facie* by the appointment. *Attorney-General v. Brackenbury*, 1 H. & C. 782.

The 27th section does not apply to limited powers (*Cloves v. Awdry*, 12 B. 604); but it does apply to married women having testamentary powers exercisable during coverture, *Bernard v. Minshull*, John. 276. And a direction that a fund (over which a power of appointment to whom she pleases is given to A.) is not to be distributed till twelve months after A.'s death, will not prevent the power from being general within this section; *Re Keown*, Ir. R. 1 Eq. 372.

Extent of applicability of section.

The intention of the Legislature was to abolish the distinction between property and power, and to make it unnecessary in framing a will to refer to the instrument creating the power, or to the subject of the power; accordingly the fact that a testator has described property subject to a general power, as his own absolutely, does not exclude the operation of the section. *Frankcombe v. Hayward*, 9 Jur. 344. So a direction for the payment of debts and the appointment of an executor will operate as an execution of a general power since the Act. *Wilday v. Barnett*, 6. Eq. 193. A direction for the payment of debts without more will also be sufficient; but (*semble*) not the appointment of an executor without more. *Re Davies*, 13 Eq. 163.

Legacies are bequests of personal property described in a general manner, *Hawthorn v. Shedden*, 3 Sm. & Giff. 293. In *Re Wilkinson*, 4 Ch. 587, a testatrix had a general power of appointment over various sums of money. She gave several pecuniary legacies and then gave the residue, subject to the payment of her debts,

to two persons, one of whom was also an executor. The Court held that these legacies were good appointments under the power, saying that it would be difficult to draw any distinction between a gift of the whole and a gift of legacies, which is merely dividing the gift into three or four portions instead of giving it in one. L. J. Giffard said that if there was a gift of 100*l.* he did not see why that should not be part of the personal estate of which the testator had power to dispose. This overrules *Hurlstone v. Ashton*, 11 Jur. 725.

In *Wilday v. Barnett*, 6 Eq. 193, there was an express appointment of an executor, and a direction that he should pay the debts and expenses out of the personal estate; there was then a gift of legacies and a gift of the residue. The Master of the Rolls considered that the will had in effect appointed the property to the executor for the purposes of paying debts and expenses, and that it is the duty of an executor to pay the legacies out of a fund so appointed to and vested in him; that being so, he thought that the gift of the residue was not an execution of the power in favour of the residuary legatee, but a gift of so much of the fund previously appointed to the executor as should remain after the payment of the debts, expenses, and legacies.

In *Re Keown*, Ir. R. 1 Eq. 372, there was a direction by will to executors to call in, receive, and raise the several moneys the testatrix should die possessed of or entitled to, and apply the same in payment of debts, funeral expenses, and legacies. The will proceeded: "And I appoint that in case there should be a sufficient overplus, my executors should pay to J. J. and H. M. 100*l.* each; and whatever money may be over and above after they are paid, I request that my executors may apply as I shall direct them by letter." There was no other residuary bequest, and no letter. The testatrix had a power of

appointing a sum to be raised out of real estate to whom she pleased, such sum not to be distributed until twelve months after her death. It was held that this general power was well exercised, and the next-of-kin of the testatrix were entitled to it. And see *post*, s. 42.

The 33rd section, enacting that a bequest to a child of a testator who dies in the testator's life-time, leaving issue living at the testator's death, shall not lapse, applies to a testamentary appointment made in execution of a general power (*Eccles v. Cheyne*, 2 K. & J. 676); but not to an execution of a limited power (*Griffiths v. Gale*, 12 Sim. 327, 354). In that case, the power was to appoint among children, and it was rightly considered that it could never have been the intention of the Act to extend a power which in its creation was restricted to children, so as to include any persons other than children.

Wills Act,
s. 33.

40. The 24th section of the Wills Act says that every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will; it follows, therefore, that—

Wills Act,
s. 24.

A general power of appointment may be well exercised by a will executed previously to the creation of the power, and that, too, by a mere residuary gift (s. 27). *Stillman v. Weedon*, 16 Sim. 26; *Moss v. Harter*, 2 Sm. & Giff. 458; *Patch v. Shore*, 2 Dr. & Sm. 589.

General
power may
be executed
by will
prior to its
creation.

Lord St. Leonards says (Pow. 305-6): "Where the property is settled by the testator himself upon others, in default of any appointment by him under his power, it would seem to require some indication of an intention by him to defeat his settlement, in order to hold a general

gift in his will, which can be satisfied by other property, to be an execution of his power." But this doubt is not borne out by the cases; the 24th and 27th sections are express, "unless a contrary intention appear *by the will*:" a testator is assumed to know that his will, if made after the Wills Act, will be construed by that Act.

In *Pettinger v. Ambler*, 1 Eq. 510, B., by his will, dated in 1858, after specific devises, gave "all other real and personal estate of which he should die possessed or should have power to dispose" on certain trusts. By voluntary settlement in August, 1862, B. conveyed all his freehold property on trust after his death for E. for life, with remainder as B. should "by his *last will* or any codicil thereto" appoint, and in default of appointment for E. in fee. In November, 1862, B., by an instrument, commencing "This is the *last will* of me," &c., and not mentioning any former will, appointed under the power an annuity to be raised out of his freehold property, and devised his copyholds, but made no further disposition of the freeholds. The Master of the Rolls held that the will of 1862 was the only will intended to execute the power, and accordingly held that both the specific and the residuary devises made by the will of 1858, failed; but he said that if the testator had not made a will after the settlement, he should have held that the first will was an execution of the power.

This case is explained by the Master of the Rolls in *Hodsdon v. Dancer*, 16 W. R. 1101.

In that case real estate was settled in May, 1849, to such uses (in the events that happened) as F. R. D. should by deed or will appoint. In 1845, F. R. D. had disposed of the whole of his property by will. In November, 1849, he made another will which only affected personalty: it was held that on the true construction of the 24th and 27th sections, the disposition of the prior will was a good

execution of the power contained in the subsequent settlement. And see *Cofield v. Pollard*, 5 W. R. 774.

In *Meredith v. Meredith*, Ir. R. 5 Eq. 565, a testatrix, in 1860, devised her real estate to certain uses; she then gave legacies, and declared that her trustees should have power to raise by sale or mortgage sufficient to pay her debts and legacies, if her personal estate should prove insufficient. In 1862, she settled her estate, reserving a paramount power to charge 1000*l.* for her own benefit. She afterwards made a codicil, giving a legacy and confirming her will. The Master of the Rolls was of opinion that the will was an express exercise of the power of charging, but at any rate the will and codicil together, without reference to s. 27, operated as an execution.

But in *Re Ruding*, 14 Eq. 266, J. C. R. transferred a sum of stock to trustees on trust for such persons as he should by deed or will appoint, and in default of appointment, for three persons named. J. C. R. had previously made a will, which would operate as an execution of this general power. V.-C. Malins considered that the evidence afforded by surrounding circumstances showed that the testator did not intend to execute this power. But it does not appear how evidence of surrounding circumstances can be admissible in such a case; the statute says, "unless a contrary intention appear *by the will*." And in *Scriven v. Sandon*, 2 J. & H. 743, V.-C. Wood says: "There is no contrary intention within the meaning of the statute, unless you find something *in the will* inconsistent with the view that the general devise was meant as an execution of the power;" and see his judgment in *Thomas v. Jones*, 2 J. & H. 475. And the circumstance that a residuary devise contained limitations *during the life of B.*, is not conclusive evidence of an intention not to execute a power, which would only come into existence in the event of B. predeceasing the testator (*ibid.*).

The contrary intention must appear by the will.

But a man can execute only such powers as are given to him during his life-time; he cannot execute a power given by the will of a person who survives him. In *Jones v. Southall*, 32 B. 31, A. by his will gave personal estate to such persons as B. should appoint. B. made his will, but died before A.; it was held not to be an execution of the power.

A limited power may be executed by a will prior to its creation.

And it seems that a limited power of appointment may also be well exercised by a will executed previously to the creation of the power, if there be a sufficient reference to the power or the subject-matter thereof.

It must be remembered that the 27th section of the Wills Act does not apply to limited powers, but it would seem that the 24th section does. (*Sed quære*, see *Cave v. Cave*, 8 D. M. S. 131, *supra*, p. 130.)

In *Stillman v. Weedon*, 16 Sim. 26, A., being entitled to a share of a testator's residuary estate, bequeathed *all the effects due to him from the estate* to his nine children. The estate was then unadministered; but it was afterwards administered, and certain debts due to it were allotted to A. as his share of the residue. A. then settled these debts on trust for such persons as he should *at any time thereafter* by deed or writing appoint, and in default for himself for life, with remainder for his sons and daughters, or any of them or any of their children, as he should by deed or writing or by will appoint. The Vice-Chancellor held the will to be a due execution of the limited power.

It might perhaps be contended that the 24th section does not properly refer to a limited power, inasmuch as the donee of such a power has a moral duty to perform in distributing the trust fund fairly and according to his judgment. And in a case, where he is not himself the settlor, it is difficult to imagine *à priori*, how he is by a previous will to describe sufficiently either the property or the power which he has not then got, so as to make

his will an execution of it. But see *Re Teape*, 16 Eq. 442. Where the testator is himself the settlor, there is perhaps reason for saying that he is fully cognizant of the circumstances of the case: he has by will disposed of the property subject to the power to the objects thereof; and by the policy of the Wills Act, a testator is supposed to have his will present to his mind to such an extent that, if he does nothing to show a contrary intention, his will represents his wishes, not only on the day when it was made, but thenceforward down to his death. Of course, a will disposing of property (afterwards duly settled and made subject to a *limited* power, although without consideration) to persons not objects of the power, could have no operation. Before the Wills Act, the republication of a will after the creation of a power in the testator would not operate to make a will prior to such creation an execution of the power. *Couper v. Mantell*, (No. 1) 22 B. 223.

Republica-
tion, before
Wills Act.

41. A power of revocation and new appointment is not exercised by general words of appointment, or (since the Wills Act) by a general devise or bequest in the absence of all evidence of an intention to revoke, if there is any other power to which the general words may refer.

What is a
sufficient
execution
of a power
of revoca-
tion.

In *Pomfret v. Perring*, 5 D. M. & G. 775—781, L. J. Turner said that general words of appointment ought not to be held to be an exercise of a power of revocation. If there was no power except one of revocation and new appointment, it would be different, and the general words would be held to be an exercise of that power. He thought it clear that an intention must be shown to revoke and undo what had been already done.

In *Freke v. Lord Barrington*, 3 Bro. C. C. 274, it is

said that a power of revocation cannot be constructively executed. And see *ante*, s. 35.

Extent to which a general power is to be taken as extended.

42. Since the Wills Act, a testator who, having a general power of appointment, directs a certain application of his property to be made, must be taken in all cases to exercise the power to the extent necessary to make the direction effectual, but no further.

The power is not to be taken as executed further than is necessary to carry out the intention: it does not necessarily follow that the donee of a general power, by exercising it (whether by direct testamentary appointment or by residuary gift) in a manner which proves either wholly or partially ineffectual, has thereby made the fund his own for all purposes. It is often difficult to discover how far the intention extends. The cases have established a distinction between appointments to the beneficiary direct and appointments to a trustee for such beneficiary.

Fund appointed to A. and lapsed by his death, goes as in default of appointment.

An appointment to A. direct, which lapses by his death in the testator's lifetime, will, in the absence of any evidence of a contrary intention, go to the persons entitled in default of appointment and not to the appointor's next-of-kin. This is of course subject to the consideration whether there are any other words (*e. g.* a residuary gift in general terms) by which the lapsed share could pass. In *Re Davies*, 13 Eq. 163, S. D., who had a general power under her husband's will, after directing that her debts should be paid, and giving pecuniary legacies, bequeathed the residue of her personal estate to M., E., W., and J. equally, and appointed an executor. M. and J. died in the testatrix's lifetime. V.-C. Wickens said that there was such an appointment as, under the old law,

would have made the fund assets for the payment of debts, and, under the new law, for the payment of legacies also. Then there was a general gift and appointment of residue which failed as to two fourth parts: the question was whether those two fourth parts (after payment of all debts and legacies) were effectually appointed for every purpose: no authority seemed to go so far, and he accordingly held that the two shares went as in default of appointment to the husband's next of kin. But see *Attorney-General v. Brackenbury*, 1 H. & C. 782; *post*, p. 194; and cf. *Re Vizard*, 1 Ch. 588.

But an appointment to B. on trust for A., which fails either wholly or partially as to the beneficial interest, will nevertheless operate as a good appointment to B., who holds on the same trusts as if it had been the appointor's own property.

Fund appointed to B. on trust for A.: does not go as if unappointed, on A.'s death before the appointor, but forms part of appointor's estate.

In *Wilkinson v. Schneider*, 9 Eq. 423, there was an appointment to trustees on trust for two persons, one of whom died in the testatrix's lifetime, and the residuary gift did not carry the lapsed moiety. It was held that it went to the appointor's next-of-kin, and not as in default of appointment. V.-C. James said that he thought it not a question of intention at all, but of resulting trust, if anything. There was an absolute severance of the property: it was appointed to B. and C., and was taken away entirely from the settlement fund, so far as the appointor could do so. B. and C. were trustees, but where was there any equity as between the persons entitled under the settlement and B. and C.? B. and C. could not, of course, keep it for themselves. The resulting trust must be for the persons who would have been entitled if the fund had been the appointor's own property.

But the rule seems to be different where the donee of the power is a married woman. In *Hoare v. Osborne*, When the appointor

is a married woman.

12 W. R. 661, a married woman, donee of a general power of appointment, appointed by will to three trustees on certain trusts, under which the ultimate residuary beneficiaries were the trustees themselves. One of the trustees died before the testatrix; another attested her will. It was held that the gifts to them which lapsed went as in default of appointment. V.-C. Kindersley thought that it was inconsistent to impute to the donee, who was a married woman, an intent to make the appointed property her own, when she could only do so for her husband's benefit: he said that if you imputed to the married woman an intention by means of the first appointment to make the property her own, it was imputing to her an intention so to deal with the property as to render herself perfectly incapable of dealing with any part of it. It is to be observed, however, that it was the married woman's *will* that was to have this effect: she could not deal with the fund after her death, and there seems no impossibility in supposing that a married woman should intend to take property entirely out of settlement, although one result may be that her husband will be benefited. *Hoare v. Osborne* might perhaps be regarded as an intermediate case between *Re Davies* and *Wilkinson v. Schneider*, for the appointees were both trustees and beneficiaries.

Lapsed appointment made by married woman.

A lapsed fund may pass by the residuary gift, if it be sufficient, either as part of the testator's estate, or as a fresh appointment. *Hoare v. Osborne* would be an authority to show that if the testatrix is a married woman, the latter would be the true construction: for otherwise the lapsed fund could not pass at all. She might by the lapsed appointment have taken the fund out of settlement and made it her own estate in all events, but she could not have made it her separate estate.

An appointment by deed by the donee of a general

power over a fund to his own executors and administrators, gives the absolute interest to himself. (*Mackenzie v. Mackenzie*, 3 M'c. & G. 559.) It would follow from this, that an appointment by will to the appointor's executors and administrators, followed by directions which either fail or do not exhaust the fund, makes the appointed fund part of the appointor's assets.

If, therefore, the appointment be to executors as executors and if the appointed fund be treated as blended with the appointor's own property, that will afford ground for presuming that the testator intended to make the fund his own for all purposes.

If the appointment be to executors as such, the fund becomes part of the appointor's property.

In *Brickenden v. Williams*, 7 Eq. 310, the donee of a general power gave all her real and personal estate over which she had any disposing power to her executors, and gave several legacies which did not exhaust the fund. V.-C. James held that she meant to make the fund part of her general estate, because she not only gave it to her executors, which he thought almost conclusive, but, having given it to the executors, she proceeded to speak of it as her *property*. She treated everything over which she had any power of testamentary appointment (and which would have included any savings of her separate estate) as one mass, giving it as one mass to her executors as executors, and constituting it one property, to be dealt with as her will directed.

In *Bristow v. Skirrow*, 10 Eq. 1, the Master of the Rolls said that the result of his own decisions amounted to this: "The donee of a power gives property to his executors: thereupon the executors take it as part of the property of the appointors, and as in that character they do not take it beneficially, they take it in trust, that is, first to pay creditors, and then the legatees, and if there are no legatees, then in trust for the next of kin of the appointor."

In *Chamberlain v. Hutchinson*, 22 B. 444, the donee of a general power over a fund which was limited over in default of appointment, appointed it to her executor, and charged it with payment of her debts and legacies, and gave half the residue, composed of the appointed fund and her own property, to A., who pre-deceased her. It was held that the moiety of the fund subject to the power passed to the appointor's next of kin, as part of her estate.

But in *Easum v. Appleford*, 5 M. & C. 56, the donee of a general power, after reciting that the fund subject to the power had been blended with funds to which she was absolutely entitled, in express execution of her power directed her trustees to invest part of the trust-funds for the benefit of her mother; and the will contained a gift of "all the residue of my stock in the funds, and all my monies and securities for money, and all the residue of my estate and effects." The mother died in the testatrix's lifetime; and it was held that, as the latter had throughout distinguished between her own property and that over which she had a power of appointment, she had shown an intention not to make the latter part of her general estate, and that it consequently went to the persons entitled in default of appointment. See this case observed on 6 Eq. 315; and *Lefevre v. Freeland*, 24 B. 403; *Wilday v. Barnett*, 6 Eq. 193; and *ante*, s. 39.

Lapse by
disclaimer.

It is perhaps doubtful whether, if an appointment lapsed by the disclaimer of the appointee, the property would go as in default of appointment or not.

It would seem to depend upon the same principles as apply in the case of death. In *Attorney-General v. Brackenbury*, 1 H. & C. 782, the donee of a general power of appointment by her will directed payment of her debts, and gave legacies, and bequeathed all the residue of her property to A., B., and C., who were

the persons entitled in default of appointment, and appointed C. D. and E. executors. If the legatees took under the will, duty would be payable at 5*l.* per cent., if under the gift in default of appointment, at 3*l.* per cent. The head note states the decision to have been, that if the testator has in the first instance charged his residuary estate with payment of debts and legacies, it is not competent for the residuary legatee to disclaim the fund under the appointment, and elect to take under the gift in default. But this is perhaps hardly a correct summary of the judgment. The Court seemed to be of opinion that the testatrix had by her appointment made the property her own for all purposes, and that the gift in default of appointment could not take effect. This, however, would be opposed to the principle of the decision in *Re Davies*, 13 Eq. 167, *ante*, p. 190, for if the disclaiming legatees had died before the testator, their shares would have gone as in default of appointment, according to *Re Davies*. Can it, then, make any difference whether the appointment fails by reason of death, or of disclaimer? The real question in each case seems to be, has the testator made the fund his own for all purposes, or has he merely interfered with the devolution of the fund pointed out by the author of the power to the limited extent necessary to benefit a particular person? Debts and legacies are always charged on the residue (*Greville v. Browne*, 7 H. L. C. 689). But the Court can hardly have intended to decide that in such cases the residuary legatee cannot disclaim, as of course no disclaimer by him could affect the direction to pay debts and legacies which in effect operate as a prior appointment *pro tanto* of the fund.

43. If the power be limited, the donee cannot appoint so as to make the property subject to it his own in case of lapse; in such cases the question is, whether the

Lapse of
appoint-
ments
under

limited
powers.

appointment lapses entirely, or whether there are other words of appointment under which the lapsed share will pass. The same question may arise in cases of general powers; but it must be remembered that since the Wills Act, a general residuary gift operates as an execution of general powers, and that a residuary gift will carry a lapsed appointment as well as a lapsed legacy.

Appoint-
ments in
aliquot
shares.

If the donee of a power, whether general or limited, appointed to A., B., and C. one-third each of the fund, subject to the power, no appointee could under that gift take more than is given to him, viz., one-third.

Appoint-
ment of
fixed sums
and residue
of a definite
sum.

If there be a definite ascertained sum, subject to a power, and the donee thereof appoint by will one sum, part of the fund, to one person, another sum, other part of the fund, to another person; and "all the rest" or "all the remainder" of the fund to a third, the third appointee cannot claim any share which may lapse in consequence of the death of either of the former appointees in the testator's lifetime. (*Easum v. Appleford*, 5 M. & C. 56; *Re Harries*, John. 199; *Lakin v. Lakin*, 34 B. 443.)

Residue as
residue: or
fund,
charged
with gifts.

But if the intention is to appoint the residue strictly as residue, or to appoint the entire fund charged with the sums specified in the preceding appointments, then the residuary clause will be read as an appointment, not of the mere balance of the fund after the sums previously appointed have been deducted from it, but of the entire fund subject to the appointments previously made, the Court acting on the manifest intention on the part of the testator to dispose of the entire fund over which he has a power of appointment. (*Re Harries*, *ibid.*)

The same rules will apply, whether the appointment fail by the death of the appointee, or by reason of his being a stranger to the power. (*Falkner v. Butler*, Amb. 514.)

In *Easum v. Appleford*, 5 M. & C. 56, the donee of a general power appointed that a fund of 3000*l.* should be transferred to trustees, on trust as to 2700*l.*, for his mother, as to 250*l.* for another person, and as to the residue, on certain other trusts. This residuary appointment, it was held, could not pass the 2700*l.* which lapsed by the death of the appointee in the testatrix's lifetime. The Lord Chancellor said: "Had the whole fund been 900*l.*, and 300*l.* of it had been given to the first legatee, and 300*l.* to the second, and the 300*l.* which will remain, after paying those two legacies thereout, to the third, no question could have arisen: and wherein is the difference?" There was another residuary gift in this will, which has been before considered, p. 194.

Cases where lapsed appointment did not pass.

In *Re Jeaffreson*, 2 Eq. 276, the donee of a limited power appointed 100*l.*, part of the fund subject to the power, to a stranger, and appointed the balance of the fund (after payment of legacies to objects of the power), which balance amounted to 260*l.*, to pay her own debts: and "should any surplus remain" she gave it to A., an object of the power. The 100*l.* appointment failed; it was held that it did not pass to A. under the gift of the surplus. And see *Wilkinson v. Schneider*, 9 Eq. 423.

In *Oke v. Heath*, 1 Ves. sen. 135, a testatrix had a power of appointment among her kin: she appointed the whole fund to her nephew, and "all the rest and residue of what she had power to dispose of" to her niece. The nephew died in the testatrix's lifetime, and the fund passed to the niece. It was as if she had said in so many words, "If anything which I have given by my will fails, I mean to sweep into this residuary bequest all that may so fail." See John. 205, and *Falkner v. Butler*, Ambl. 514.

Cases in which lapsed appointments passed. Residue as residue.

In *Carter v. Taggart*, 16 Sim. 423, a testatrix had a general power of appointing a sum of 10,000*l.* Consols: Entire sum charged with particular gifts.

she appointed thus, "Now I do give and bequeath the said 10,000*l.* Consols in manner following, that is to say, I give to A. 500*l.* sterling; I give to my executors 600*l.* Consols on trust to pay the dividends to B. during her life, and after her decease, the said 600*l.* to sink into the residue of my estate; I give and bequeath to C., his executors and administrators, all the rest and residue of the said 10,000*l.* Consols after deducting therefrom the legacies above mentioned." A. died in the testator's lifetime: it was held that his 500*l.* passed to C. under the residuary gift; and see *re Harries*, John. 199.

How lapse
may be
excluded.

As the donee of a general power can appoint to whom he pleases, he can of course exclude lapse by appointing to the executors and administrators of the appointee as persons to take in substitution for him; but in order to exclude lapse, the intention to do so must be clearly expressed, and the persons to take in substitution must be definitely pointed out: mere words of limitation will not do. (*Browne v. Hope*, 14 Eq. 343.) This could not be done in the case of a limited power, as the executors and administrators of an object would be strangers to the power. (*Maddison v. Andrew*, 1 Ves. sen. 57.)

44. The question of abatement depends on much the same principles as those applicable to lapse.

Abatement
when
aliquot
shares.

Where a fund is appointed in aliquot shares, if it prove insufficient, the shares will abate proportionately: so, too, if the donee of a power mistake the amount of the fund and appoint more than the full amount in specific sums, *e.g.*, if he have power to appoint 1000*l.*, and he appoint 800*l.* to A. and 400*l.* to B. by the same instrument, the appointees must abate rateably. (*Lawrie v. Clutton*, 15 B. 65.) In that case the Master of the Rolls said that the testatrix believed she had power to dispose of 19,900*l.* Consols; she had, in fact, only a

When
specific
sums are
appointed.

power of appointing 10,000*l.* She appointed 9900*l.* to A. and 10,000*l.* to B.; that sum was therefore to be divided between them in the proportion of 99 to 100.

The appointment of specific sums and the residue of Residue. an ascertained fund may or may not be an appointment of the residue specifically according to the expressions used; but to make the residue specific the fund must be ascertained. (*Petre v. Petre*, 14 B. 197.)

If there is a definite fund, subject to a power of When specific. appointment by will, and a will purporting to be made in exercise of that power, and appointing one sum, part of the fund, to one person, and another sum, another part of it, to another, and "all the rest" or "all the remainder" of the fund to a third, this last appointment is read as an express specific appointment of the residue of the fund; *e.g.*, if the fund be 3000*l.*, and 1000*l.* be appointed to A. and 1000*l.* to B. and the rest to C., that is read as an appointment to C. of 1000*l.* (*Page v. Leapingwell*, 18 Ves. 463.) C. could take no more than 1000*l.*, although both A. and B. died in the testator's lifetime and the appointments to them lapsed (*Easum v. Appleford*, 5 M. & C. 56); although Sir William Grant, in *Page v. Leapingwell*, seems to have thought that it might be otherwise. If, therefore, there is a deficiency, in such a case, all the three will abate rateably. (*Elwes v. Causton*, 30 B. 554.)

In *Booth v. Alington*, 5 D. M. & G., there was an appointment of 30,000*l.*, "part of" a sum of 120,000*l.*, over which the testatrix had a power of appointment given her by another testator: the latter's estate did not enable the payment of the 120,000*l.* in full. It was held that the intention was to appoint 30,000*l.* at all events, and that the expression "part of" merely referred to the fund out of which it was to be paid.

And if the intention be clear, the amount of a charge Abatement

of charge
in propor-
tion to
deficiency
of estate
charged.

for portions on an estate covenanted to be bought for a certain sum, may abate if the full amount be not forthcoming to be expended on the purchase of the estate to be charged.

In *Chambers v. Chambers*, Mos. 333, a father on his son's marriage covenanted to lay out 6000*l.* in the purchase of lands, to be settled in strict settlement, charged with 2000*l.* for the portion of younger children, or 3000*l.* for daughters if there were no sons, and further covenanted to settle his own estate on his son and the heirs male of his body. The money was subscribed into the South Sea Company and was reduced to 3000*l.* Lord King held that the eldest son was not to bear the loss, but that the younger children should abate in proportion. He read the covenant as one to invest a sum in a particular manner, and that the fund, being so invested, two-thirds should belong to the eldest son and his issue and one-third to the other children.

In *Miller v. Huddlestone*, 6 Eq. 65, a testator gave his wife a power of appointment over 5000*l.* : she appointed this sum to trustees on certain trusts, subject to a power of appointing the same to the amount or value of 1000*l.*, therein given to two of her nieces: the power was to appoint any part of the said trust-moneys (not exceeding 1000*l.*) as the donee should think fit; and the trustees were to stand possessed of the trust-fund (subject to the payment of the respective sums thereinbefore mentioned, not exceeding 1000*l.* each) for A. and B. The husband's estate was inadequate to produce the 5000*l.* V.-C. Malins held that the intention was that the power of appointment should extend to one-fifth of the whole fund, whatever that fund might amount to; and he held that the sums subject to the nieces' powers of appointment must abate rateably.

When the

But if the intention is to appoint a specific sum and

a residue strictly as residue, or to appoint the entire fund charged with the specific sum, then in case of deficiency the residue must bear the loss. residue bears the loss.

So too, if the appointment is not made so as to operate on a fund of unvarying amount, or if the appointor does not assume that a given sum or an estate of a given value will be available, the residuary appointment must bear the loss. (*Petre v. Petre*, 14 B. 197; *De Lisle v. Hodges*, 22 W. R. 363, 17 Eq. 440.)

If there be successive independent appointments by separate instruments, which in the aggregate more than exhaust the fund, the latest appointment must bear the loss. (*Trollope v. Routledge*, 1 De G. & Sm. 662.) But if the appointments were all made by one instrument which at once takes effect as to all the objects, if the whole fund is given to several objects, one of whom is necessarily named last, the last-named cannot be made to bear the loss merely because he is mentioned last (cf. *Bulteel v. Plummer*, 6 Ch. 160), although of course the appointor may prefer one appointee if he chooses, but he must express his intention clearly, and the onus lies on the person seeking to establish priority. (*Miller v. Huddleston*, 3 M'c. & G. 513.) Appointments by separate instruments.

Where an appointment is made to take effect out of a trust fund generally, and afterwards an appointment is made of a specific portion of the trust fund, the portion of the fund not specifically appointed must be first applied in satisfaction of the first appointment, and the specifically appointed portion is only to be resorted to in the event of a deficiency. (*Morgan v. Gronow*, 16 Eq. 1.)

In the ordinary case of a testator who gives legacies to a greater amount than his estate will meet, if any of such legacies lapse, the others benefit by getting paid in full, or at any rate to a greater extent. And it seems that this would be the case if the donee of a power of Who profits by an abatement.

appointment over a fund, which was limited over in default of appointment, were to appoint it by one instrument in such sums as to exceed its limits: if one appointment were to lapse the others would gain. It seems possible, however, that there might be cases in which the persons entitled in default might claim to have the abatement, that would have been necessary if the deceased appointee had lived, made for their benefit; it would be a question of intention, and would turn on the form of appointment in each case.

Appointed
property
assets for
payment of
debts.

45. Both real and personal estate, subject to general powers of appointment, become assets for the payment of the appointor's debts, if the power is actually exercised in favour of volunteers; and it makes no difference whether the power is exerciseable by deed or by will, or by will only. (*Jenny v. Andrews*, 6 Madd. 264; *Fleming v. Buchanan*, 3 D. M. & G. 976.)

It is not the possession of the power, but the exercise of it, which gives occasion to the application of the principle: the instrument by which it is executed is therefore unimportant.

“The rules of the Court are established, as far as they can, in favour of just creditors, and to prevent persons having powers from disposing thereof voluntarily to defeat creditors. On that ground was *Shirley v. Lord Ferrers*, (7 Ves. 503 *n.*) which has been allowed ever since, and is agreeable to *Lascelles v. Lord Cornwallis*. A distinction was endeavoured, that the appointment by Lord Ferrers was by will, this by deed; because whoever takes by will takes as a legacy. But that is not a material distinction, for, if established, the justice intended by the Court in these

cases would be avoided in every instance, as then it would be putting it barely on the form of the conveyance, and elude the rule of justice. Nor is there any substantial ground for this distinction; for if there is a power to execute by will or deed, though executed by will, it operates not as a will to that purpose, but as an appointment; not as an appointment of his own assets, but of the estate of another, and takes not place by force of the will; it is therefore a slight and shadow of distinction only." Per L. C. Hardwicke, *Townshend v. Windham*, 2 Ves. sen. 1, 10.

The rule as to voluntary conveyances is there stated to be that they are void not only as against subsequent purchasers (under 27 Eliz. c. 4), but also as against creditors (under 13 Eliz. c. 5), if the settlor was indebted at the time of making such conveyance. But if he were not indebted at the time, it will be good against subsequent creditors. "On that foundation the Courts have grounded their opinion in the execution of powers, when they stop *in transitu*, as it is called, and say it shall not be given away from creditors." *Ibid.* And see *Bayspoole v. Collins*, 6 Ch. 228; *Crossley v. Elsworthy*, 12 Eq. 158; *Mackay v. Douglas*, 14 Eq. 106.

Voluntary conveyances.

In order to make the fund assets for the payment of debts, the power must be actually exercised. (*Holmes v. Coghill*, 12 Ves. 206.) It is impossible, so long as the distinction between property and power exists, to make a fund subject to a power which has never been executed, assets for the payment of the debts of the donee of the power. The persons to whom the fund is given in default of appointment, have at least an equal equity with the donee's creditors. It rests with the donee whether he will execute the power or not; but if he has once done so, he will be considered to have exercised his right to intercept the devolution of the property on

The power must be executed.

the remainder-man, and equity will interpose to give the property, if appointed to volunteers, to his creditors. Lord Eldon in this case thought that even a defective execution would be sufficient: but see as to this, *post*, “Defective Execution,” s. 7.

It is sufficient, however, if the donee of a general power by his will directs payment of his debts without more, and appoints an executor: the fund subject to the power will be liable to supply the deficiency of his own assets to pay his debts. (*Re Davies*, 13 Eq. 163.) And it would be the same although no executor were appointed. But it has not yet been decided that the appointment of an executor without more would, since the Wills Act, operate as an execution of the power so as to make the fund assets: and so to hold would appear to give a very unnatural construction to s. 27. (*Ibid.*)

Do appointments by married women make the property appointed assets for payment of their debts?

46. There has been considerable conflict of authority as to property over which married women have a general power of appointment. A married woman in respect of her separate estate is considered as a feme sole; it is clear, therefore, both on principle and authority, that not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their separate estates, except as the Statute of Frauds may interfere, where the separate property is real estate. (*Tullett v. Armstrong*, 4 B. 319.)

Limitations which amount to an absolute interest.

It has been decided by the Privy Council that a gift to a married woman for her separate use for life, with remainder as she shall by deed or will notwithstanding coverture appoint, with remainder to her executors and administrators, is equivalent to an absolute gift to the sole and separate use of the lady. Such a form of gift to a married woman without any restraint on anticipation, vests, in equity, the entire corpus in her for all purposes as fully as a similar gift to a man would vest it in him.

Consequently an appointment by will by a married woman in such a case makes the fund liable to her general engagements. *Chartered Bank v. Lemprière*, L. R. 4 P. C. 572, following *Johnson v. Gallagher*, 3 D. F. & J. 494, and dissenting from *Shattock v. Shattock*, 2 Eq. 513.

Limitations in this form may therefore be considered equivalent to a trust of the corpus of the fund for the separate use of the married woman. In such cases, in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to and upon the faith or credit of that estate: whether it is so or not, is a question to be judged of by the Court upon the circumstances of each case. (3 D. F. & J. 515.)

How separate estate is bound.

But the term "general engagement" is an ambiguous and misleading one. If it is meant merely to say that goods sold to a married woman in the ordinary course of domestic life, that contracts expressed to be made by her in respect of property not her separate estate, *e.g.* for buying or selling or letting or hiring a house, do not necessarily impose a liability to be satisfied out of the separate estate which she may happen to have, in that sense and to that extent, the proposition that her separate estate is not liable to her general engagements is quite accurate. But it would be very inconvenient that a married woman with a large separate property should not be able to employ a solicitor, or a builder, or tradesman, or hire labourers or servants, and very unjust if she did, that they should have no remedy against such separate (property. (L. R. 4 P. C. 593.)

What is a general engagement.

The question of the liability to general engagements is more difficult when the married woman has not an absolute interest in the corpus of the fund. L. J. Turner, in *Johnson v. Gallagher*, 3 D. F. & J. 494, 517, considers

When the limitations do not amount to an absolute interest.

the question how far debts, obligations, and engagements affect the corpus of the property, where the married woman has a limited interest only, as an estate for life with a power of appointment. He divides the cases on the subject into three heads—

- (i.) Where the power of appointment is general, by deed, or writing, or will.
- (ii.) Where it has been by will only, and the power has been exercised.
- (iii.) Where there has been a limitation in default of appointment, and the power has not been exercised.

In this last case, the debts and engagements of the married woman cannot prevail against the title of the persons entitled in default of appointment. It can make no difference whether a man or a married woman be the donee of the power if it be not exercised.

When the power is by deed or will, the corpus is liable.

(i.) Where the power of appointment is exercisable by deed or by will, the corpus of the estate seems liable to the married woman's debts, although there is a recent decision to the contrary.

But only to extent of life interest during the married woman's life.

L. J. Turner, in *Johnson v. Gallagher*, sums up the law on the subject thus (p. 518) "In this case the Courts have certainly held the corpus of the property to be subject to the debts and engagements of the married woman (*Allen v. Papworth*, 1 Ves. sen. 163; *Hulme v. Tenant*, 1 Bro. C. C. 15; *Heatley v. Thomas*, 15 Ves. 596); although it is to be observed that during the life of the married woman, the Court has never gone further than to affect the limited interest. (*Hulme v. Tennant*; *Field v. Sowle*, 4 Russ. 112.) There has been much question on what grounds the Court has thus subjected the corpus of the property to the debts. In most, if not all, of these cases, the liability of the corpus has been put upon the ground that the instruments by which the debt was

created or secured, operated as executions of the power of appointment;* but it seems clear that such instruments cannot operate as appointments in the strict sense of the term. They do not take effect according to their priorities. They create no lien or charge. (*Hulme v. Tenant*; *Duke of Bolton v. Williams*, 4 Bro. C. C. 297; *Owens v. Dickenson*, Cr. & Ph. 48.) Lord Cottenham in the last of these cases, after giving his opinion that transactions of this description have no resemblance to the execution of powers, has said that what they are it is not easy to define, and no doubt there is much difficulty in defining them. Perhaps the nearest approach to a definition of them may be, that they are transactions which create a debt payable out of the separate estate, and out of that estate only, and which in that sense, but in that sense only, have the character of appointments; and this perhaps is what Sir John Leach may have meant in *Field v. Sowle*, where he speaks of the Court acting on the security of the wife, not as an agreement to charge her separate property, but as an equitable appointment." He then proceeds to give other reasons for considering the doctrine of appointment exploded, and asks how then do they operate? "I think the answer is to be found in *Hulme v. Tenant*. When a man contracts debts, both his person and his property are by law liable to the payment of them. A Court of equity having created the separate estate, has enabled married women to contract debts in respect of it. Her person cannot be made liable either at law or in equity, but in equity her property may. This Court therefore, as I conceive, gives execution against the property, just as a Court of law gives execution against the property of other debtors. *Hulme v. Tenant* seems to have proceeded on this ground, and

* This was one of the grounds of the decision in *Chartered Bank v. Lemprière*, L. R. 4 P. C. 572, at p. 590.

Lord Eldon seems to have considered it to be the right ground, for in *Nantes v. Corrock*, 18 Ves. 258, we find him refusing to enforce the claim of a creditor against the separate estate, on the ground that it consisted of stock, which could not be taken in execution at law. In my opinion, this is the true footing on which these cases stand. It is to be considered, then, what are the consequences which result? A legal debtor may alien his property before it is bound by judgment or execution. Why may not a married woman do the same as to her separate property? Her creditors are not appointees of the property. They have no charge or lien upon it. She may contract other debts, and all her creditors will be paid *pari passu*. (*Anon.* 9 Ves. 182.) She may thus exhaust the fund by contracting fresh debts. Why may she not mortgage or alienate it? There is no instance, so far as I am aware, of this Court having restrained her from doing so; nor, so far as I can see, any principle on which such a restraint could be imposed. I think, therefore, her power of alienation remains, notwithstanding any debts which she may have contracted. A Court of equity will indeed, as it seems, enforce the right which she has created against her separate estate, after the determination of the coverture, or after her death. (*Field v. Sowle*; *Nail v. Punter*, 4 Sim. 474.) But in so doing it proceeds, as I apprehend, upon this principle—that having created the right as a feme sole, she cannot, when she has actually become so, be permitted to disturb it.”

On the other hand, in *Shattock v. Shattock*, 2 Eq. 182, the Master of the Rolls dissented from L. J. Turner’s statement of the law in *Johnson v. Gallagher*, and held (p. 188), that “separate property is not, after the death of the married woman, liable to pay her general debts, either in the case of her having been absolutely entitled to the property, or of her having had only a life estate

with a power to dispose of it by deed or will, and having executed that power by will." If she executes it by deed, her execution (he says) takes effect according to the terms of the appointment. In *Chartered Bank v. Lemprière*, 4 P. C. 572, 594, the Privy Council expressed themselves unable to concur with the Master of the Rolls, and agreed with L. J. Turner's view of the law. And as to costs of probate of a married woman's will executing a power, see *Adamson v. Hammond*, L. R. 3 P. & D. 141.

(ii.) Where the power is exerciseable by will only, it appears to be still doubtful whether the appointed property becomes assets for payment of the married woman's debts.

Where the appointment is to be by will only.

In *Sockett v. Wray*, 4 Bro. C. C. 483, where money was settled on trust for the separate use of a married woman for life, with remainder as she should by will appoint, Lord Alvanley held that she could not give the property away absolutely at once, but that she could only affect the fund by a revocable instrument.

In *Shattock v. Shattock*, 2 Eq. 182, 194, the Master of the Rolls expressed his opinion that in such a case the property was not liable to pay her general creditors.

In *Vaughan v. Vanderstegen*, 2 Drew. 165, the Vice-Chancellor, after pointing out the distinction between property in which a married woman had a separate estate, and a power vested in her, held that the exercise of a power of appointment by will did not make the property applicable to the payment of her engagements in the nature of debts—viz., of such engagements as would be charges on her separate estate. He showed that the execution of a power by will over a reversionary interest expectant upon the appointor's death could not make the property appointed her separate estate: and if not, it could not be applied in payment of her debts or engagements in the nature of debts, to the payment of which nothing is applicable but separate estate. On the other hand,

L. J. Turner appears to have been of a different opinion in *Hughes v. Wells*, 9 Ha. 749. (See 3 D. F. & J. 517.)

And on further consideration, in *Vaughan v. Vanderstegen*, 2 Drew. 363, the Vice-Chancellor held that, fraud having been practised by the married woman, the creditors were entitled to the appointed fund. He in fact held that the *fraud* made the appointed estate part of the general assets of the married woman. On this the Privy Council remark (L. R. 4 P. C. 596): "It is not easy to see on what principle the fraud could alter the nature of the property subject to appointment, or affect the appointees. It is easy to see how fraud might make that a debt, to which the married woman would be in equity liable, notwithstanding her coverture, and that, there being such a liability or debt, equity would deal with any property to which she was, notwithstanding coverture, absolutely entitled, and any property over which she had a general power of appointment, exactly as it would do in the case of a man or feme sole dying indebted. Given the relation of debtor and creditor in equity, all the consequences of such relation would appear to follow, just as if there were no coverture in the case."

As the decisions at present stand, it seems, therefore, that a married woman who has a life estate to her separate use, with a power of appointing the corpus by will only, does not, by exercising her power, make the fund assets for the payment of her debts. But it may be doubted whether the authority of such cases is not shaken by the decision of the Privy Council in *Chartered Bank v. Lemprière*, and of V.-C. Kindersley on the second hearing of *Vaughan v. Vanderstegen*. The question is between the appointees of the married woman, who are mere volunteers, and her creditors: the equity of the latter appears the better. And as to the question whether a married woman can be made bankrupt, see *re Heneage*, 9 Ch. 307.

47. If a man has both a power and an interest, and does an act generally as owner of the land without reference to the power, the land shall pass by virtue of his ownership, not of his power. (*Clere's case*, 6 Co. Rep. 17.)

Where a man has both a power and an interest.

But where the disposition will be absolutely void if it do not enure as an execution of the power, effect will be given to it by that construction. (*Ibid.*) Thus, if a married woman, having a power and an estate in default of appointment, devises the estate, the disposition will operate as an execution of the power, because otherwise it would fail altogether. (*Roscommon v. Fowke*, 6 Bro. P. C. 158; Sug. Pow. 347.) On the same principle, where a man has both a power and an interest, and he creates an estate which will not have an effectual continuance in point of time if it be fed out of his interest, it shall take effect by force of the power. (*Ibid.*)

If he both grant his estate and exercise his power, the estate shall pass in the manner best adapted to carry out the intention of the parties. (*Cox v. Chamberlain*, 4 Ves. 631.)

In that case lands were limited to such uses as A. should appoint, and in default of appointment to him in fee. A., by lease and release, in pursuance of all powers vested in him, granted, bargained, sold, aliened, remised, released and confirmed, limited, declared and appointed the estate to trustees to uses. If the deed operated as a grant, the title was good; if as an appointment, bad. Lord Alvanley said that it would be monstrous to hold that, where there is a power and an interest, and the act being equivocal, it is doubtful whether the donee thereof acted

under the one or the other, the Court should adopt that which would defeat the instrument, and he accordingly held the appointment nugatory.

Lord St. Leonards (Pow. 357) points out that this did not decide that where there is first a formal appointment, and then a release or grant of the estate, the instrument shall in favour of the intention be held to operate simply as a release or grant. But he considers it the better opinion that it would so operate. However, in *Roach v. Wadham*, 6 East, 289, an estate was conveyed to A. and his heirs to such uses as B. should appoint, and in default of appointment to the use of B. and his heirs. By this deed a perpetual rent was reserved to the vendors, and B. covenanted for the payment of it. Afterwards, A., by B.'s direction, bargained, sold, and released, and B. granted, &c., and also appointed the premises and all his estate therein, to C. and D. and their heirs, to hold to them their heirs and assigns as tenants in common, subject to the rent. There were covenants in the deed by C. and D. to pay the rent, but D. did not execute it. The Court held that the deed operated as an execution of the power, and not as a grant of the interest, and that consequently C. was not liable in an action of covenant for non-payment of the rent, inasmuch as he claimed by a title paramount to the estate of B. (See this case observed on, Sug. Pow. 359.)

If he either grant his estate or exercise his power, and full effect will not be thereby given to the intention of the parties, the estate shall be held to pass in the manner not expressed to be intended in order to effectuate the general intention. (*Tomlinson v. Dighton*, 1 P. W. 148 ; *Campbell v. Leach*, Ambl. 740 ; *Doc d.*

Daniel v. Kerr, 4 M. & R. 101 ; and see *Wade v. Paget*, 3 Bro. C. C. 364 ; explained, Sug. Pow. 348.)

So, if a man have a power of revocation and new appointment over an estate, and he grant the estate to new uses without reference to his power, this will operate as an exercise of his power. (Sug. Pow. 346.)

If the power be executed, but prove to have been previously destroyed, or to have been in its inception badly created, the donee's interest shall make good the default in appointment.

Appointor's estate shall make good the deficiency of the appointed estate.

In *Mandeville v. Roe*, 1 J. & L. 371, estates were settled after the death of husband and wife to trustees for a term, and subject thereto to the husband in fee; the trusts of the term were, in case the wife should die in the lifetime of the husband, leaving children living at her decease, to raise 8,000*l.* for portions for the children, to be divided between them as the husband should appoint. The wife did not die in her husband's lifetime; but he made his will, reciting the power, and purporting to execute it. L. C. Sugden held that he could not correct the settlement, or hold that the contingency on which the charge was to arise was unimportant. But he held that the testator had perfect ability to give that which he assumed to give, not by virtue of the power, but by force of that which came in lieu of the power. The power was intended to be operative in one of two events; in the other event, the estate was vested in the husband, and supplied the place of the power. (And see *Cross v. Hudson*, 3 Bro. C. C. 31 ; *Mortlock v. Buller*, 10 Ves. 292, 315.) "I never heard it as a point to be maintained, that because a man shows an intention to execute a power which he has

not, the interest which he had in the estate should not bear out the disposition he thinks proper to make of a charge on that estate." (*Per* Lord Thurlow, *Cross v. Hudson*, 3 Bro. C. C. 30.) In that case, the testator had at his death no power at all, and the will must have operated on his estate or have been wholly nugatory. But it would make no difference whether he had no power at all, or a power which he imperfectly executed. In *Sing v. Leslie*, 2 H. & M. 68, the testator's primary intention was to execute his power, but, at the same time, there was an equally marked intention to charge the estates; and the question was, whether the plain intent of the testator, to which he had the means of giving effect out of his reversionary interest, and which he certainly wished to effectuate, was to be defeated because the testator imagined that his will could operate by way of execution of the power. The Court carried the intention into effect.

Reserva-
tion of
powers of
revocation.

48. Powers of revocation and new appointment may be reserved *toties quoties* by instruments executing a power, although such reservation be not expressly authorized by the instrument creating the power. (Sug. Pow. 387.)

And the power of revocation may be reserved to the survivor of the joint donees of the power of appointment. In *Brudenell v. Elwes*, 1 East, 442, 7 Ves. 382, a power of appointment among children, to be executed by husband and wife jointly or by the survivor of them, with or without power of revocation, was executed by both, reserving a power of revocation to the survivor. The execution of the latter power by the survivor was held valid. (Cf. *Montagu v. Kater*, 8 Ex. 507, *post*, p. 218.)

It makes no difference whether the power be simply collateral, appendant, or in gross: it is well settled that

those who can make an absolute appointment can also make a qualified one. (Sug. Pow. 389.)

If the power be limited—*e.g.*, to appoint among the children of A.—the donee cannot of course alter the objects by appointing to the children and reserving a power of revocation and new appointment to whom he pleases. But the formalities to accompany the revocation and new appointment need not be the same as those which were made requisite to the original execution. (Sug. Pow. 367.) It does not appear to have been decided whether a limited power, exerciseable with the consent of A., could be exercised, reserving a power of revocation and new appointment without such consent; if it could, it would probably be a breach of trust on A.'s part to permit it.

The creator of the power may show that it was his intention that a power of revocation should not be reserved, or that such a power should be exerciseable only during a limited period. "Suppose the instrument creating the power had fixed the day when it must be executed, it seems impossible to doubt that revocation would have been excluded, because there could be nothing more contrary to the constitution of the power than such an execution of it. In like manner, I should have no doubt that, if a power is directed to be executed on or before a given day, a clause of revocation may be inserted, but then it can only enable the new appointment under it to be made on or before the given day." (*Per Lord Brougham, in Piper v. Piper*, 3 M. & K. 166; and see *Cooper v. Martin*, 3 Ch. 47.)

Creator of powers may exclude power of revocation.

49. A power, if once executed, cannot be revoked, unless a power of revocation be reserved by the instrument executing the power, although the instrument creating the power authorizes revocation expressly.

Power of revocation must be reserved by the instrument which is to be revoked.

The rule applies whether the property subject to the

power be real or personal. (Sug. Pow. 390.) This was expressly decided in *Worrall v. Jacob*, 3 Mer. 256, and it made no difference that the appointor had retained the deed in her own custody; and the mere attempt to vary the dispositions could not of itself prove that the omission of a power of revocation was occasioned by fraud or mistake. In *Hele v. Bond* (Sug. Pow. 908, Finch 474), A. made a settlement reserving power by deed to revoke it, and by the same deed or any other, from time to time to limit new uses. A. revoked the settlement and limited new uses, but reserved no further power to himself: it was held that he could not, by virtue of the first power, limit any other uses. The principle of this decision—namely, that an instrument *executing* a power must expressly reserve any powers which may be intended to be retained—is an express authority for the rule above stated. The only exception to this is that class of cases of which *Chadwick v. Doleman*, 2 Vern. 528, is the first, by which appointments made to a younger child who afterwards becomes an eldest son are revoked, as having been made on a tacit condition.

Reserva-
tion of
powers of
new ap-
pointment.

50. The same principle applies to cases where powers of new appointment, and not merely of revocation, purport to be reserved. A power of revocation in an *original* settlement authorizes of itself a limitation of new uses. (Sug. Pow. 371.) But a power of revocation in a deed *executing* a power will not of itself authorize a new appointment.

The rules regulating the effect of successive executions of powers upon the original powers and uses in a settlement, where new powers have been reserved upon every occasion, are laid down in *Saunders v. Evans*, 8 H. L. C. 721, 6 D. M. & G. 654. These rules do not of course apply to powers which are executed by will: for a will is by its nature always revocable. *Lisle v. Lisle*, 1 Bro. C. C. 533.

If there is an original power of appointment, and then an execution of that power, reserving a power only to revoke, followed by a revocation, the original power remains unaffected. And if in the first instrument executing the original power there is reserved a power of revocation and new appointment, such instrument does not constitute a new settlement destructive of the first, nor is the original power thereby exhausted and at an end, but upon the revocation of such instrument remains in full force. If there is a power of appointment to be exercised by deed or will, and the first instrument executing the power is a deed which contains the reservation of a power to revoke and to appoint anew by deed, and then there is a simple revocation of this instrument, the original power on such revocation being in full force, there may be a valid execution of it by will as well as by deed.

Successive
executions
of primary
powers.

In *Saunders v. Evans*, an estate in land was settled in 1794 to the use of two persons successively for life, with remainder to such uses as A. (one of the life tenants) should by any deed, with or without power of revocation, attested by two or more witnesses, or by will attested by three witnesses, from time to time and as often as she should think fit, appoint. In 1830, A. exercised the power by deed, reserving a power of revocation and new appointment by deed. In 1833, a deed revoking that of 1830, and newly appointing and also reserving power to revoke and appoint anew by deed, was executed. This course was exactly repeated in 1835 by a deed of that date. In

1836, A. executed another deed, simply revoking that of 1835. In 1848, by a will reciting the power of 1794, A. declared the uses of the estate. It was held that the deed of 1830 had not exhausted the power of 1794 and substituted a new power for it, to be executed only by deed, and that consequently on the revocation in 1836 of the last preceding deed, the power of 1794 was capable of being exercised by A. either by deed or by will.

In *Montagu v. Kater*, 8 Ex. 507, there was a limitation to the husband and wife for life, and then to their children as they should jointly appoint with or without power of revocation and new appointment, and in default of joint appointment, as the survivor should by deed or will appoint. The husband and wife appointed to a son in fee, reserving a joint power of revocation and new appointment: they afterwards revoked this, but made no new appointment. The husband survived his wife, and by his will again appointed the estate to the son in fee. This was held valid. The judges said, "By the execution of the joint power the estate was limited to the defendant in fee. The revocation of that appointment, also jointly made, revived the original power of joint appointment, and with it the dependent power of appointment by the survivor in case of default." (And see *Sheffield v. Von Donop*, 7 Ha. 42.)

Where the power revoked is not a primary power.

The power in *Saunders v. Evans* was what Lord St. Leonards calls a primary power—*i.e.*, the lands were settled to such uses as A. should appoint, and in default, over. A different question would arise if the power were not primary—*i.e.*, if the lands were settled to uses with a power to A. to revoke and limit anew.

In such a case, if the power of revocation and new appointment were executed, and then that second appointment revoked without more, the uses of the original settlement would not be revived. L. J. Turner, in

Evans v. Saunders, 6 D. M. & G. 678, says that in that case the revocation by the last deed of the last deed but one did not operate to revive the uses limited by the last deed but two. He thought that each revocation was absolute, and that there was no proper analogy between that case and the case of a repealing statute restoring other statutes which had been abrogated by the statutes repealed. In such cases, the revival of the original statutes takes place by virtue of the repeal; but in a case like *Evans v. Saunders*, the question must be governed by intention, but only by intention as shown by the operation of the deeds. (8 H. L. C. 741.)

In *Ward v. Lenthall*, 1 Siderf. 344 (cited 6 D. M. & G. 673), there was a settlement with power to revoke and limit new uses; then there was a revocation with a limitation of new uses and with power to revoke, but with no power to limit new uses; and then there was a revocation of the uses limited by the first appointment with a limitation of new uses. Here, then, the exercise of the power of revocation by the first appointment wholly destroyed the uses created by the settlement. The exercise by the second appointment of the power of revocation reserved by the first appointment destroyed the uses created by that first appointment, but did not affect the revocation of the original uses which had been made by the first appointment, and the consequence was that there were no subsisting uses: the fee resulted to the settlor discharged of all the uses. The settlor in that case was the donee of the power: the result would be the same if the donee were not the settlor—*e.g.*, if lands were settled by a father on a son and his issue, with a power of revocation and new appointment to the son, and this power was executed reserving a power of revocation; if that revocation were exercised, the lands would, it seems, result to the father.

Probate
duty.

51. It may be here added, that under 55 Geo. 3, c. 184, probate duty attached only to the actual property of the deceased, and was therefore not payable in respect of property over which the testator had a mere power of appointment. (*Platt v. Routh*, 3 B. 257, affirmed *sub. nom. Drake v. Attorney-General*, 10 Cl. & F. 257; but see *Palmer v. Whitmore*, 5 Sim. 178; Sug. Pow. 204.) But now, by 23 Vict. c. 15, s. 4, it is provided that the stamp duties payable by law upon probates of wills and letters of administration with a will annexed, in England and Ireland, and upon inventories in Scotland, shall be levied and paid in respect of all the personal or moveable estate and effects which any person dying after the 3rd April, 1860, shall have disposed of by will under any authority enabling such person to dispose of the same, as he or she shall think fit.

Legacy
duty.

The Legacy Duty Act, 36 Geo. 3, c. 52, s. 7, provides that any gift by any will or testamentary instrument of any person dying after the passing of the Act, which shall by virtue of such will or testamentary instrument have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of the Act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged only on such personal estate, or charged also on the real estate of the testator or testatrix who shall give the same: except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the will or testamentary instrument by which the same shall be given.

The power must be a general one. The effect of this section is to prevent the operation of the ordinary rule of

law (according to which, whatever is done in pursuance of a power is to be referred to the instrument by which the power is created, and not to that by which it is executed as the origin of the gift), and to render any property which is appointed by will in pursuance of a general power for that purpose chargeable with duty as a legacy under that will, whether the power was created by deed (as in *re Cholmondeley*, 1 Cr. & M. 149), or by a previous will (as in *Platt v. Routh*, 3 B. 257). In the case of a power created by will, if the donee of the power is also the donee of any limited interest in the property, the effect of s. 18, *post*, of the last-mentioned Act is to supplement the provisions of s. 7, by making the property appointed chargeable upon the exercise of the power with duty as a legacy to the donee of the power under the original will, in addition to the duty with which it becomes chargeable as a legacy to his appointees under his own will. (Hanson on the Legacy and Succession Duty Acts, 2nd edit. 91.)

We have seen that a power to appoint to any one except A. is a general power. (*Eddie v. Babington*, 3 Ir. Ch. R. 568, *ante*, p. 7.) And for the purposes of the Legacy Duty Act, a power to appoint to such persons, other than J. W. and his relations, M. H. and his relations, and the relations of the donee's late husband, as she should choose, has been held to be a general power. (*Platt v. Routh*, 3 B. 257, *sub. nom.* *Drake v. Attorney-General*, 10 Cl. & F. 257.) And the power is considered absolute, although it is exerciseable by will only. (*Attorney-General v. Brackenbury*, 1 H. & C. 782.)

What is a general power for the purposes of the Act.

Where the power is a limited one, the execution thereof is referred to the instrument creating it, and legacy duty is or is not payable accordingly, without reference to the instrument by which the power is executed.

Limited power.

As to legacies subjected to powers of appointment, it

Legacies subject to powers.

is provided by s. 18, that where any legacy, or the residue or any part of the residue of any personal estate shall be subjected to any power of appointment to or for the benefit of any person or persons specially named or described as objects of such power, such property shall be charged with duty as property given to different persons in succession; and in so charging such duty, not only the person and persons who shall take previous and subject to such power of appointment, but also any person and persons who shall take under or in default of any such appointment, when and as they shall so take respectively, shall in respect of their several interests, whether previous or subject to or under or in default of such appointment, be charged with the same duty, and in the same manner, as if the same interests had been given to him, her, or them respectively in or by the will or testamentary disposition containing such power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof, as the case may happen to be: and where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to every person or persons to whom the property would not belong in default of such appointment, such property upon the execution of such power shall be charged with the same duty and in the same manner as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof: and where any property shall be given with any such general power of appointment, which property in default of appointment will belong to the person or persons to whom such power shall also be given, such property shall be charged with and shall pay the duty by the Act imposed, in the same manner as if

such property had been given to such person or persons absolutely in the first instance, without such power of appointment.

By 16 & 17 Vict. c. 51, s. 4, it is provided, that where any person shall have a general power of appointment under any disposition of property taking effect upon the death of any person dying after the 19th May, 1853, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power: and where any person shall have a limited power of appointment under a disposition taking effect upon any such death over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor. The power must take effect upon a death after the Act; in such a case the duty will attach, although the power may have been exercised before the Act. *Re Lovelace*, 4 D. & J. 340. (And see Hanson, 303.)

Succession
duty.

Sect. 42 makes the duty a first charge upon the property, but provides that where any settled real property comprised in a succession shall be subject to any power of sale, exchange, or partition, exerciseable with the consent of the successor, or by the successor with the consent of another person, he shall not be disqualified by the charge of duty on his succession from effectually authorizing by his consent the exercise of such power, or exercising any power with proper consent, as the case may be; and in such case the duty shall be charged substitutively upon the successor's interest in all real property acquired in substitution for the real property before comprised in the succession, and in the meantime upon his interest also in all moneys arising from the

Succession
duty not to
prevent
execution
of powers
of sale, &c.

exercise of any such power, and in all investments of such moneys.

This section has been held to extend to a case where lands were settled subject to an existing jointure, and the donees of a power of sale contained in the settlement sold with the jointress's consent. It was contended that s. 42 applied only to sales under powers which overrode the charge in respect of which the succession would arise, but the L. C. Hatherley thought otherwise. (*Dugdale v. Meadows*, 6 Ch. 501.)

CHAPTER VI.

EXCESSIVE EXECUTION.

<p>1. <i>Definition.</i> 226</p> <p>2. <i>Perpetuities: distinction between general and particular powers.</i> <i>ib.</i></p> <p style="padding-left: 2em;"><i>Perpetuities: distinction between particular powers created by deed and by will.</i> <i>ib.</i></p> <p>3. <i>What estates may be created under special powers, in point of perpetuity.</i> 227</p> <p>4. <i>General rule as to appointments contravening rules against perpetuity; are not generally severable.</i> 229</p> <p>5. <i>Excess by contravening the terms of the power.</i> 232</p> <p>6. <i>Absolute appointments followed by improper modifications.</i> 234</p> <p>7. <i>Gift over by way of executory limitation to a stranger after appointment to an object.</i> 236</p> <p>8. <i>Gift over to an object by way of executory limitation after an appointment to a stranger.</i> 237</p> <p>9. <i>Appointment to contingent class, or to take effect in futuro.</i> 239</p> <p>10. <i>Appointments to objects and strangers by way of remainders.</i> 240</p>	<p style="padding-left: 2em;"><i>By deed; by will.</i> 240, 241</p> <p>11. <i>Appointments by way of remainder not accelerated.</i> 243</p> <p>12. <i>Effect of attempted delegation of power on gifts to take effect in default of exercise of such delegated powers.</i> <i>ib.</i></p> <p>13. <i>Appointments to objects and strangers equally.</i> 245</p> <p>14. <i>Are good, if separable.</i> <i>ib.</i></p> <p>15. <i>Appointment to object must be absolute and distinct, if it is to prevail.</i> 246</p> <p>16. <i>Are appointments apportionable in respect of the acts to be done under them?</i> 247</p> <p>17. <i>Cypres.</i> 248</p> <p>18. <i>The application of the rule of cypres is apportionable.</i> 249</p> <p>19. <i>Where the excess consists in the appointment of estates larger than authorised.</i> 250</p> <p>20. <i>What is a good execution in respect of the interest given.</i> 251</p> <p style="padding-left: 2em;"><i>By whom appointments are to be carried out.</i> 252</p> <p>21. <i>Instances of appointments under particular powers which are not excessive.</i> 253</p>
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1. Excess in the execution of powers consists in the transgression either of the rules of law or of the scope of the power.

Perpetui-
ties.

2. The rules against perpetuities apply to instruments executing powers as well as to other instruments. (Lewis on Perpetuity, 482.) But there is an important distinction between general and particular powers in this respect.

Particular
power.

The donee of a general power is virtually absolute owner of the property over which his power extends; and he is to be regarded as absolute owner for the purpose of considering the application of the rule against perpetuities to him. The donee of a particular power is not absolute owner: he cannot create any estate in point of perpetuity which might not have been created by the instrument containing the power: he cannot appoint to any person to whom the original creator of the power could not have appointed. "The test of the

Test of
validity of
estates ap-
pointed.

validity of the estates raised is to place them in the deed creating the power in lieu of the power itself." (Sug.

Distinction
between
particular
powers
created by
deed and
by will.

Pow. 395-6.) Inasmuch as wills do not come into operation until the death of the testator, there is an important distinction between powers *created* by deed and by will: a deed speaks from its own date, and subsequent events cannot affect the validity of limitations then contained in it. But a will speaks from the death of the testator: and thus, limitations, which were bad when the will was made, may prove good when it comes into operation.

In *Peard v. Kekewich*, 15 B. 166, there was a devise in trust for A. for life, with remainder to any of his children as he should appoint. At the date of the will A. had no child, but at the death of the testator he had a son, B., 3 years old. A., by will, appointed to trustees and their heirs in trust for B. and his heirs, and to be conveyed to him at 23, with a gift over to other sons if B. died under

21; and he directed the rents to be accumulated until B. or such other sons should attain 23, and then to pay them over. It was held that the gift was not too remote, and that the direction to accumulate was valid. In this case, the appointment to the son and the direction to accumulate until he attained 23 were considered as distinct and separable from the appointments over to the other sons, and the directions to accumulate affecting their interests if they arose; for B. was the only son born during the lifetime of the creator of the power; the trusts for accumulation, therefore, so far as they affected the other children of A., were void, as transgressing the laws against perpetuity; and see *Duke of Devonshire v. Lord G. Cavendish*, 4 T. R. 741, n.; *Wilkinson v. Duncan*, 30 B. 111.

3. It remains to consider what estates may and what may not be created under special powers, having regard to the rule against perpetuities.

A power of appointment among children is well executed by an appointment to one of them for life, with power to dispose of the capital by deed or will, whether such children were *in esse* at the creation of the power or not; for this in effect gives the whole beneficial interest to the appointee, and does not transgress any rule against perpetuity. *Bray v. Bree*, 2 Cl. & F. 453.

Appointment to one for life with general power of disposition, good.

And a like appointment to one of the objects of the power for life, with a power of disposition by will only, is good, if such object was *in esse* at the time of the creation of the power. *Phipson v. Turner*, 9 Sim. 227; *Slark v. Dakyns*, 15 Eq. 307.

In *Morse v. Martin*, 34 B. 500, the persons to whom appointments were made for life, with power to appoint by will, appear to have been *in esse* at the date of the creation of the power. But such an appointment will not be good if the object was not *in esse* at such time.

Secus, if the power of disposition be testamentary only.

In *Wollaston v. King*, 8 Eq. 165, a testatrix had a power under her marriage settlement to appoint a fund in favour of the children of the marriage: she appointed, in execution of the power, a part of the fund to her son C. for life, with remainder to such persons as he should by will appoint. As the effect of this would be to tie up the appointed part of the fund, and render it incapable of disposition during the whole lifetime of C., who was not *in esse* at the time of the creation of the power, this remainder after C.'s life estate was held void.

Power of appointing after marriage.

So an appointment (under a power in a marriage settlement) upon such trusts to take effect after the marriage of a daughter (unborn at the date of the settlement, and then unmarried) as she should by deed or will appoint; and in the meantime on trust for her for life, and after her death as she should by will appoint, was held void as to all except the life interest; for marriage is as uncertain with regard to the time at which it may take place, if it ever does take place, with reference to lives in being, as death is. *Morgan v. Gronow*, 16 Eq. 1.

The daughter's execution of her power would of course be invalid also; for no act of hers could make the appointment to her valid.

If, however, the daughter was married at the time of such an appointment, the objection would not apply, and the appointment would be good. (*Ibid.*)

Appointment to unborn child for life, with remainder to his child.

If a power of appointment among issue be given by a settlement or by a will to a person unmarried at the date of the settlement or of the death of the testator, as the case may be, an appointment to a child for life, and after his death to his eldest son living at his death or born in due time after, is of course void for all beyond the life estate (*D'Abbadie v. Bizoin*, Ir. R. 5 Eq. 205); for an estate cannot be limited to an unborn child for life with remainder to that unborn child's children. (Sug.

Pow. 392); but a life estate may be appointed to an unborn child, either simply or with remainders over, provided that such remainders over are not to the unborn child's issue. And an appointment with restraint on anticipation contravenes the rule against perpetuities.

In *Fry v. Capper*, Kay 163, there was a power of appointment among children contained in a marriage settlement; in execution of this, a share of the trust fund was appointed to trustees for the separate use of a married daughter (unborn of course at the date of the settlement) for life without power of anticipation, and after her decease for her general appointees. The appointment was upheld, but the restraint on anticipation was rejected; (and see *re Teague*, 10 Eq. 564; *re Cunynghame*, 11 Eq. 324; *Thornton v. Bright*, 2 M. & C. 230.)

Appointment of estate without power of anticipation.

4. Subject to the exceptions hereafter noticed, appointments which contravene in part the rule against perpetuities are not severable, but fail wholly. It is a rule that

A gift under a power, embracing objects not within the line of perpetuity, is wholly void, and the fund cannot be given to those to whom it might have been legally appointed. Sug. Pow. 505; *Gee v. Audley*, 1 Cox, 324. Lewis on Perpetuity, 493; *Routledge v. Dorril*, 2 Ves. jun. 357.

Gift contravening rule against perpetuity wholly void.

“It is said, if all the children cannot take, why may not those to whom she might have appointed? I answer, because she did not mean those only, but all.” *Per* Lord Alvanley (*Ibid.* p. 366.)

The rules with reference to perpetuity applicable to gifts by will are analogous to those applicable to appointments under powers. It must be remembered of course

Rules laid down in *Cutlin v. Brown*.

that limited powers are to be referred to the instrument creating, and not to the instrument executing them, for the purpose of determining their validity in respect of perpetuity.

The rules as to executory devises are thus stated by V.-C. Wood in *Cattlin v. Brown*, 10 Ha. 372 :—

Gift must vest within proper period.

(1.) An executory devise is bad unless it is clear at the death of the testator, that it must of necessity vest in someone, if at all, within a life in being and 21 years afterwards. *Dungannon v. Smith*, 12 Cl. & F. 546, 570.

Rule of construction.

(2.) You must ascertain the objects of the testator's bounty by construing his will without reference to the rules of law against perpetuities; and having, apart from any consideration of the effect of those rules in supporting or destroying the claim, arrived at the true construction of the will, you are then to apply the rules of law as to perpetuities to the objects so ascertained.

This rule may be considered to be to some extent limited by *Martelli v. Holloway*, L. R. 5 H. of L. 532, the head note of which is: "There may be a particular clause in a will, which on one construction appears to offend against the law relating to perpetuities, but if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will."

Gift bad in toto.

(3.) If the devise be to a single person answering a given description at a time beyond the limits allowed by law, or to a series of single individuals answering a given description, and any one member of the series intended to take may by possibility be a person excluded by the rule as to remoteness, then no person whatever can take, because the testator has expressed his intention to include all, and not to give to one excluding others. *Dungannon v. Smith*, 12 Cl. & F. 546.

(4.) Where the devise is to a class of persons answering a given description, and any member of that class may possibly have to be ascertained at a period exceeding the limits allowed by law, the same consequence follows as in the preceding rule, and for the same reason. You cannot give the whole property to those who are in fact ascertained within the period, and might have taken if the gift had been to them *nominatim*, because they were intended to take in shares to be regulated in amount, augmented, or diminished, according to the number of the other members of the class, and not to take exclusively of those other members; and see *Smith v. Smith*, 5 Ch. 342; *re Stark*, 21 W. R. 165. One case (*re Moseley's Trusts*, 11 Eq. 499) appears to be contrary to this; but the Vice-Chancellor's statement of the case in his judgment differs from the statement in the report: in the report the gift is on trust for A., and after her death for all her children who shall attain 21, and the issue of such of them as should die under that age leaving issue, *which issue shall afterwards attain 21, or die under that age leaving issue*. The Vice-Chancellor (p. 502) says: The gift is to the children who attain 21, and the issue of those who die under that age, so that necessarily the whole number of the class will be ascertained within a life in being and 21 years.

Gift also
bad *in toto*.

(5.) Where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law. *Storrs v. Benbow*, 2 M. & K. 46.

Gift when
severable.

It is also established that where there is an appointment, under a power of appointment among children contained in an antenuptial settlement, to a married daughter for

life without power of anticipation, the life estate and the restraint on anticipation may be severed, and the appointment upheld as to the former, while the latter is rejected. *Fry v. Capper*, Kay, 163, and cases, *ante*, p. 229.

Excessive execution with reference to the terms of the power.

5. It remains to consider executions which are excessive with reference to the terms of the power. Such excess may be either by way of conditions annexed, limitations or modifications added, or power delegated; the same rule applies to all; namely,

Excess rejected if separable.

Where there is a complete execution of a power and something added which is improper, the execution is good and the excess void; but where there is not a complete execution, or where the boundaries between the excess and the execution are not distinguishable, the whole appointment will fail. *Alexander v. Alexander*, 2 Ves. sen., 640.

“Suppose a power to a man to appoint 1000*l.* among his children: if the father gives the 1000*l.* to his children and annexes a condition that they shall release a debt owing to them or pay money over, the appointment of 1000*l.* would be absolute, and the condition would be only void.” (*Ibid.* p. 644.)

Excess by way of condition.

In *Sadler v. Pratt*, 5 Sim. 632, A., having four children by her first husband and three by her second, and having power to appoint a fund among the former only, appointed it amongst all her children equally, and declared that if her children by her first husband should refuse to share the fund with her other children, the whole fund should go to her youngest child by her first husband. It was held that the appointment was not wholly void, but that the first class of children took

each one-seventh of the fund under it, and the other shares went to them equally as in default of appointment. And see *Palsgrave v. Atkinson*, 1 Coll. 190.

But it will be otherwise if the condition be inseparable from the exercise of the power.

In *Webb v. Sadler*, 8 Ch. 419, the donee of a power of appointment among children appointed to trustees on such trusts as one of the children, by deed executed with the consent of the donee of the power during his life, and after his death with the consent of the trustees, should appoint. This consent was held to be inseparable from the power, and to render it wholly void. And see *Hay v. Watkins*, 3 Dru. & War. 339; *D'Abbadie v. Bizoin*, Ir. R. 5 Eq. 205.

And if the condition were precedent, the whole appointment would fail; for there would be no absolute appointment to the object of the power. *Richardson v. Simpson*, 3 J. & L. 540.

If there be an appointment to an object subject to a charge for an unauthorised purpose, the appointee will take the gift freed from the charge. In *re Jeaffreson*, 2 Eq. 276, the donee of a limited power appointed the balance of the fund, after payment of legacies to objects of the power, "to pay her own debts, and should any surplus remain" she gave it to an object of the power. This was held to be a gift, subject to an invalid charge: the charge therefore dropped, but the gift remained.

But the donee of a power of appointment among children which authorises exclusion may appoint to one child on a contingency, and if that contingency does not happen, then to another child. In *Caulfield v. Macquire*, 2 J. & L. 170, the donee of an exclusive power of appointment among children recited that her daughter M. had declared her intention of becoming a nun, and had already retired into a convent preparatory

Whole appointment fails if condition is inseparable.

Excess by way of charge on appointed fund.

Conditional appointments, when good.

thereto, and that her patrimony in that case would be sufficient for her maintenance; and she added, that if her daughter changed her mind and returned to her family, she gave 1000*l.* to trustees on trust for M. to receive the interest during her life, and at her decease to be divided amongst her children, if any; or in either case of her not leaving the convent or not leaving issue, the 1000*l.* to be divided amongst other objects of the power. This appointment was held authorised by the power.

It is the same if the event on which the gift over is to take effect be some act to be done by the appointee, if such act be consistent with the scope of the power. In *Stroud v. Norman*, Kay, 313, the donee of a power of appointment and selection among children appointed to child M. on condition that she made a payment out of certain funds to her brothers, who were also objects of the power; and there was a limitation over to her brothers if she did not. This was held to be valid and within the scope and object of the power. And see *Roberts v. Dixwell*, Sug. Pow. 930.

In these cases there was a gift over in the event of the contingency not happening, or the condition not being performed. It does not appear to have been decided whether, if there were no limitation over, the appointed property would go as in default of appointment, or to the person who was intended to benefit by the performance of the condition to the extent of his loss, and the residue to the appointee; the Court would probably adopt the method best suited to carry out the intention and to compensate the disappointed person. (Cf. "Election," *post*.)

6. The principle in the construction of wills that a qualifying trust, introduced subsequently to an absolute gift, operates only so far as it can take effect, and that the rest of the gift remains in the original objects as

Absolute
appoint-
ment fol-
lowed by
modifica-
tions.

given to them (*Lassence v. Tierney*, 1 Mac. & G. 551) applies to appointments under powers as well as to bequests and devises. *Churchill v. Churchill*, 5 Eq. 44. In that case, the donee of a power of appointment among children appointed the fund subject to the power to his three daughters equally, and gave his residuary estate to the same three daughters, and he went on to direct that the share to which each daughter would be entitled under the appointment and the residuary gift should be held in trust for the daughter for life, with remainder to her children. The appointment was held to give the daughters an absolute interest. And see *Carver v. Bowles*, 2 R. & M. 304; *Woolridge v. Woolridge*, John. 63; *Kampf v. Jones*, 2 Keen, 756; *Harvey v. Stracey*, 1 Drew. 137—140.

But no case has yet, it seems, gone the length of deciding that, if the donee of a limited power appoints to an object of the power in trust for strangers, the object would hold the fund for his own benefit. In such a case it would probably be held that the whole appointment was one and indivisible (cf. *Rucker v. Scholefield*, 1 H. & M. 36; *Gerrard v. Butler*, 20 B. 541; Sug. Pow. 518, and *post*, s. 15); or perhaps the true objection against holding such an appointment valid would be that there was no intention on the part of the appointor to benefit the object to whom the appointment was actually made. In the cases above referred to, the appointees have all been primary objects of the appointor's bounty, and the quantum only of interest given has been modified. If there were no intention to benefit the appointee at all, it would be difficult to hold that he took absolutely. On the other hand, this makes it a mere question of degree; the rule stated in s. 5 seems equally applicable to either case. It might also be thought to be in a sense a fraud on the power.

An executory gift over to a stranger will defeat the original appointment if the event happens.

7. If there be a gift over to a stranger by way of executory limitation, the original gift, although distinct from such gift over, will fail on the occurrence of the event on which the executory gift was limited to take effect, notwithstanding that such gift over, being to a stranger, cannot have any validity. *Doe d. Blomfield v. Eyre*, 5 C. B. 713 ; Sug. Pow. 512—14.

In that case, the donee of a power of appointing real estate among children, appointed to a son in fee (subject to a charge in favour of another son). But in case neither of her sons should be living at the decease of her husband, she appointed to a trustee on trust for persons not objects of the power. The Court of Exchequer Chamber held that the son took a vested defeasible estate in fee, and that the appointment over alone was void; and as both the sons died in the lifetime of the father, the estate thereupon became divested and went as in default of appointment. But see *Jackson v. Noble*, 2 Keen, 590 ; *Brown v. Nisbet*, 1 Cox, 13.

In *Jackson v. Noble*, there was a gift to trustees on trust for A. for life, and after her death on trust to convey to her heirs, executors, &c.; but in case A. should marry and have no children, then the property to belong to D.; or in case of his decease before A., then to his children. D. died in the lifetime of A., leaving no children. A. married and had no children. The Master of the Rolls said, that having regard to the intention of the testator and the words in which the gift over was expressed, that gift over was to take effect only in the event of A.'s marrying and dying without issue in the lifetime of D., or of his children; and as he died in A.'s lifetime without children, the contingent executory gift

could not take effect, and the vested estate of A. could not be divested.

The question seems to be one of intention in each case, *i.e.*, whether the testator or appointor meant that the original gift should be absolute, unless the event on which the executory gift over is limited happened, *and* the gift over was then capable of taking effect; or whether the original gift was intended to cease absolutely on the happening of the event on which the gift over is limited, irrespective of the validity of such gift over. And cf. *Webb v. Sadler*, 8 Ch. 419, 426.

8. If there is an appointment to an object, followed by an appointment to a stranger absolutely, with an executory appointment over in certain events to an object, this executory appointment will fail or take effect according to the event: if the event on which it is to arise happens, it will take effect; if not, it will fail. And during such time as it is in suspense, the property will go as in default of appointment.

Executory gift to an object in defeasance of an appointment to a stranger is good or bad, according to the event.

The same rule would apply if the appointment were by will to a stranger direct, with an executory appointment over; thus, if there be an appointment by will to A., a stranger, in fee, but if he die without issue living at his death, to B., an object, the validity of this latter gift would depend on the event: if A. died without children, B. would take; but if not, B. could not take, although A., not being an object, could himself take nothing; and during A.'s lifetime, the estate would go as in default of appointment.

In *Alexander v. Alexander*, 2 Ves. sen. 640, the donee of a power of appointing personalty amongst children

appointed to a daughter, C., for life and after her death to her children then living: in default of such children, the property was to go to her if she survived her husband, but if she predeceased him, to J. and M., two other children of the donee.

The appointment to the children of C. was of course bad; and the Master of the Rolls said, that if C. left children at the time of her death, it was impossible that any of the limitations over could take effect: that her children, although they could not take themselves, would yet prevent the limitation over. The contingency of the death of C. without leaving any children living at her death was not mentioned in the judgment.

In *Routledge v. Dorril*, 2 Ves. 357, Lord Alvanley says, it would be monstrous to contend that although the appointment to a child is expressed to be on failure of the existence of persons incapable of taking, yet, notwithstanding they do exist, she should take as if it was not appointed to them.

Alternative
gift.

The gift fails or takes effect according to the event. In *Crompte v. Barrow*, 4 Ves. 681, under a power to appoint among children, there was an appointment to a child for life and after his decease to his wife and children; but in case he should die without leaving a wife or child him surviving, then to another object of the power. The Master of the Rolls held the ultimate appointment good, and distinguished the case from *Routledge v. Dorril* and *Robinson v. Hardcastle*, 2 T. R. 245, on the ground that the limitation over in this case was in effect to A. if B. should die without leaving a wife or children him surviving. "It fails as far as it affects to give interests to the children; but is there any occasion to make it fail upon the other point, the gift over to a person who is an object of the power? Why am I to exclude the person taking over, who has a right to

take? There are two alternatives: if B. leaves no wife or children at his death, then the limitation over, being to a good object, shall take effect; if he does leave a wife or children, then it cannot take effect."

In *Hewitt v. Dacre*, 2 Keen, 622, the donee of a power of appointment among children, by will appointed shares to two of his daughters for life, "and in case any of the testatrix's children should die before her, she gave the share of him or her so dying to his or her lawful issue; but in case there should be no such issue, the survivors or survivor of the testatrix's own children to take." The Master of the Rolls said, there was an alternative gift: it was as if the testatrix had said, If my daughter die in my lifetime and shall have issue, I give her share to such issue; but if she has no issue, I give her share to the survivors or survivor of my own children: as to the latter alternative the appointment is good in favour of the children surviving at the death of the testatrix. And see *Lewis on Perpetuity*, 501.

9. Appointments to a contingent class are good, although there may be a period during which the persons who will form that class are not ascertained; and an appointment which is made to take effect at a future period is not void *ab initio*, because it may, when that period arrives, include persons not objects of the power; and an appointment made to take effect at a future period does not become void *in toto*, because it turns out when that period arrives that it actually does include persons not being objects of the power. The rule, as stated by V.-C. Kindersley in *Harvey v. Stracey*, 1 Drew. 136, is as follows: "If a fund is appointed to objects of the power, that is, if in that respect it is correct, the appointment will be valid, notwithstanding that the persons who are to take as appointees, or the shares and interest which they are to take under the appointment, are made contingent upon a future

Appoint-
ment to
contingent
class; or to
take effect
in futuro.

event, provided the contingency must happen within the period prescribed by the rules relating to perpetuity ; and if the fund is appointed not entirely to objects of the power, but partly to strangers, it will be still valid *quoad* those, who are the objects of the power, and the appointment will fail only as to those persons who are not objects of the power."

Appoint-
ments to
objects and
strangers
by way of
successive
limitations.

10. Powers may also be exceeded by limitations to or trusts in favour of persons who are not proper objects. In the simple case of an appointment of real or personal estate to A., a proper object, for life, with remainder to B., not an object absolutely, the rule above stated (s. 5) applies, and the appointment to A. for life is good, and the remainder to B. fails, and the estate which purports to have been appointed to him, goes as in default of appointment.

If the appointment were by will of real estate to A. for life as before, with remainder to the children of A. (not objects) in tail, the rule of *cypres* would give A. an estate tail ; see *post*, s. 18.

But the case is less simple when the appointment is to a person not an object for a particular estate, followed by limitations to persons who are objects, and different rules apply to such appointments according as they are made by deed or by will.

By deed.

(If real estate be appointed by deed to A. (not an object) for life with remainder to B. (a proper object) in fee, the whole appointment would fail: for A.'s life estate being invalid, B.'s remainder would have no particular estate of freehold to support it, and must fail too.

In *Brudenell v. Elwes*, 1 East, 442, the donee of a power of appointment among children appointed by deed

life estates to a son and daughter respectively, with remainder to trustees to preserve, with remainder to the son's sons in tail, with remainder to another son for life, with remainder to trustees to preserve, with remainder to the second son's sons in tail, with remainder to the daughter in fee. Both the sons died without issue; but it was held that the remainder in fee to the daughter was invalid, as it was dependent on the invalid limitations to the son's sons. And the appointment being by deed the doctrine of *cyprès* could not apply, nor could it be in any way dependent on the event, for a deed speaks from its own date, and the estate created must be good *ab initio* in order to take effect.

But the appointment by will of a particular By will.
estate to a person not an object of the power, with remainder to persons objects of the power, is a good appointment in remainder, if the power authorizes an appointment in remainder; but the particular estate fails, and the subject of the power, during its continuance, goes to the persons entitled in default of appointment.

In *Crozier v. Crozier*, 3 Dru. & War. 353, there was a devise of lands subject to a power of appointment among children to the testator's wife for life, on condition that she maintained his children thereout. The testator then bequeathed 500*l.* to each of his younger children and devised the said lands to his eldest son in fee. The devise to the wife was held void, except to the extent necessary to enable her to maintain the children, and to raise 500*l.* for each of the younger ones, and the residue during her life went as in default of appointment: the son's remainder was held good, but was not accelerated.

In that case Lord St. Leonards examines the law on

the subject of devises and testamentary appointments in an exhaustive judgment. As to devises, he says that although the particular estate is given to a person incapable of taking, or is not given at all, the devise in remainder or at the future time is valid. "Now this depends wholly upon intention, which the Courts execute even at the expense of the general rule of law, and this intention is thus executed, because the disposition is by will. Whether a man have the fee vested in him, or only a general power of appointment, his intention expressed in his will is equally to be executed. It matters not whether he appoints or devises, provided he do not exceed his power. . . . There ought to be no trifling distinctions between power and property upon merely technical grounds. The object of powers sanctioned by law is to enable the donee, to the extent of his authority, to do what a commensurate estate would have enabled him to accomplish." He then reviews the cases of *Alexander v. Alexander*, 2 Ves. sen. 640; *Cavendish v. Cavendish*, 4 T. R. 741; and *Robinson v. Hardcastle*, 2 Bro. C. C. 22, 344; and concludes that the question turns upon the intention, and not upon anything peculiar to powers, beyond the circumstance that the invalidity of the intermediate estates was occasioned by an excess in the execution of the power: and he considers that the same rule would be applicable whether such intermediate estates were invalid by an excess of the power, or by reason of a general rule of law.

These rules
do not
apply to
personalty.

But these distinctions are not applicable to personalty. Personalty is not subject to rules of tenure, and cannot at law be held otherwise than absolutely: it does not admit of estates. Personal property would therefore be vested in trustees, and the distribution of the property would depend on the ordinary rules of equity, so far as they were applicable to the particular case.

11. An appointment by will to an object of the power in remainder after a particular estate to a stranger is not accelerated, unless a contrary intention can be gathered from the instrument executing the power: but the estate goes during the period over which the particular estate, if valid, would have extended, to the persons entitled in default.

Remainder
not accele-
rated.

In the case of the devise or bequest of a particular estate which fails, the remainder is accelerated, in the absence of intention to the contrary: in the case of wills executing powers, although the particular estate fails, the remainder continues such, and the estate during the life of the intended taker goes as in default of appointment. (*Crozier v. Crozier*, 3 Dru. & War. 353, 365.)

But if the intention is clear, the remainder may be accelerated.

Unless an
intention
be shown.

In *Craven v. Brady*, 4 Eq. 209, 4 Ch. 296, the donee of a general power appointed real estate to his wife for life, and from and after her death to his son, with a proviso that if she should deprive herself of the rents and profits (which event happened) "her life estate should cease and determine as fully and effectually as it would by her actual decease." The M. R. considered that the testator had expressed a clear intention, that if the appointment to his wife for life should cease by reason of any forfeiture, in that case the appointment in favour of the son should take effect at once; and he held accordingly that the son's estate in remainder was accelerated; and this was affirmed on appeal.

12. If the donee attempts to delegate his power, but does not appoint any estate in contravention of

A delegated
power does
not prevent

the gifts
over depend-
ent on it
from taking
effect.

the terms of the power, and appoints in default of the execution of the delegated power to proper objects, this will be a valid appointment to them, the will being read as if the words purporting to delegate the power formed no part of it. (*Ingram v. Ingram*, 2 Atk. 88.)

In *Carr v. Atkinson*, 14 Eq. 397, the appointment was to M., an object of the power, during her life, and after her decease on such trusts for the benefit of any surviving husband (not an object of the power) of M. for his life or any shorter period as she should, notwithstanding coverture, by will appoint: and subject thereto, in trust for other objects of the power. The M. R. held that the will was to be read as if the words which related to the delegated power formed no part of it, and that the construction of the will was not affected thereby.

In *Webb v. Sadler*, 8 Ch. 419, there was an appointment under a power of appointment among children to trustees, on such trusts as H. (a son) by deed executed with the consent of the father during his life, and after his death with the consent of the trustees of his will or by will, should appoint, and in default, on trust for H. for life or until bankruptcy, and after his death for his executors and administrators. It was held that the appointment on such trusts as H. should appoint, with consent, was void, but that the limitation over in default was valid, and gave H. an absolute interest subject to forfeiture on bankruptcy. The Lord Chancellor said: "The declared intention is, that unless estates that would displace this gift to the son are created in favour of other persons by means of the power, then the son is to take under this part of the instrument; and if the power is void, then no such estate could be created, and the event never could arise which alone

was meant to prevent the gift in favour of the son taking effect."

13. Powers may also be exceeded by appointments to persons who are and persons who are not objects of the power. If the gift to the object is distinct and separable from the gift to the stranger it will be valid, and the latter alone will fail.

Appoint-
ments to
objects and
strangers
equally.

In *Bruce v. Bruce*, 11 Eq. 371, under a power to appoint an estate among A. B. and C., an appointment was made to A., charged with 3000*l.* for the benefit of B. C. and D. This sum was held well appointed to B. and C.; and (*semble*) the amount that would have been D.'s share went as in default of appointment.

14. If the appointment be to persons as a class, some of whom are and some are not objects, and it is impossible to define how much of the appointment falls within the power and how much without it, the whole appointment will fail.

If the gifts
to the ob-
jects and to
strangers
are not
separable.

In *Re Brown's Trusts*, 1 Eq. 74, there was a power of appointment among "all and every the children or child or more remote issue" of a marriage given to the wife. She appointed to trustees upon trust to pay the income to the only child of the marriage for life, or until he became bankrupt or assigned, and then to trustees for his life "for the benefit of the said son, his wife and children, or any of them, as the trustees should think expedient." The appointment was held void *in toto*. The first appointment to the son until death or assignment or bankruptcy was good, *Carr v. Atkinson*, 14 Eq. 39; the report seems to imply that it was altogether bad; but as the son had assigned, his estate had then terminated, so that it was not necessary to consider the point. *Alexander v. Alexander*, 2 Ves. sen. 640, is not an authority on this point.

In *Harvey v. Stracey*, 1 Drew. 73, 117, the Vice-Chancellor says: "Now when an appointment is to a class, some of whom are within, and others are not within the proper limits of the power, if the class of persons is ascertained, so that you can point to A., who is within the limits, and say so much is to go to him, though the others are not within the limits, yet the appointment to A. shall take effect; but if the appointment is to a class, some of whom may, and others may not, be objects of the power, and there is nothing to point out what portion is to go to those who are within the power, and what to those who are not, the whole fails."

The appointment must be absolute and distinct in order to prevail.

15. If there be no absolute appointment to an object of the power, but the appointment is coupled with the whole series of invalid limitations over, so as to form one system of trusts, the whole appointment will fail.

In *Rucker v. Scholefield*, 1 H. & M. 36, the donees of an exclusive power of appointing among children and their issue born during the donee's lifetime, appointed that the trustees should stand possessed of the fund upon the trusts following, that was to say, on trust to appropriate one-fifth for the benefit of each daughter, and to pay and apply the income of the share of each for her separate use; and after the decease of each daughter, upon trusts for the benefit of her children. The life interests only were held valid. V.-C. Wood said: "In all cases of this kind, the question turns upon the language in which the appointment is attempted to be made. If you find a clear and definite gift of the property to be appointed, and then, engrafted upon that, subsequent provisions directing the fund to be settled, so as to show that the purpose was, first, to make the gift to and for the benefit

of the person named, and then to have the fund settled : in a case of that kind, if the limitations of the proposed settlement are such as cannot become operative, the first absolute gift is held to take effect without restriction. So if you find a clear gift, followed by words which affect to divest it, and the limitations over are imperative, then the Court will uphold the gift, striking out the limitations which cannot have any legal effect. But if the words of the original gift are coupled with the whole series of limitations over, so as to form one system of trusts, then all that can be done is to give effect to so much of the limitations as may be consistent with law." In that case, the trustees were to stand possessed of the fund "on the trusts following;" then followed the trusts as above. The reference to the trusts following must be taken to include all the trusts, following, as they did, in one connected series. He held it impossible to stop after the first part, which, if it stood alone, would no doubt confer absolute interests on the daughters; but he must take the reference to be to the whole system of trusts, and the result was that each daughter took a life interest in one-fifth for her separate use, and, subject to that, the fund went as in default of appointment. It is a question to be decided in each case, whether the words of appointment are sufficient to vest the property in the objects of the power absolutely with something improper superadded, or whether the superadded terms constitute an essential part of the appointment itself.

16. We have seen that the Court will uphold *pro tanto* an appointment which is partly good and partly bad if the good and bad are separable; but it is doubtful whether this principle could in practice be extended so as to apportion an appointment, not in respect of the persons to whom it is made, but of the acts to be done by its direction. Thus in *Ferrand v. Wilson*, 4. Ha. 344, where the power was to

Are appointments apportionable in respect of the acts to be done under them?

cut timber and accumulate the produce for a term beyond that allowed by law, V.-C. Wigram (p. 377) doubted whether a power, not to effect a single act at a period too remote, but to do successive acts from time to time, each being *pro tanto* an exact fulfilment of the intention of the testator, might not be apportioned and sustained, so far as its operation in each case did not invade the rule against perpetuities, and held void only from the time that it would begin to infringe that rule. On principle, there would appear to be no objection, but it is difficult to see how any such power could be modelled so as to preserve the intention of the testator. But see *ante* (s. 4), and *Gee v. Audley*, 1 Cox, 324.

17. The Court in some instances interposes in favour of the general intention and executes the particular intention *cyprès*.

This doctrine of *cyprès* applies to testamentary appointments as well as to devises. But it does not apply—1, to appointments by deed (*Brudenell v. Elwes*, 1 East, 440); 2, to appointments of personalty (*Routledge v. Dorril*, 2 Ves. jun. 357, 365); 3, or (*semble*) to appointments of blended real and personal estate (*Boughton v. James*, 1 Coll. 44.)

The doctrine of *cyprès*, as applicable to ordinary devises, is thus stated by Lord Mansfield in *Chapman v. Brown*, 3 Burr. 1626 :—"Where there is a limitation for life to a person unborn, with remainder in tail to the first and other sons, as they cannot take as purchasers but may as heirs of the body, and as the estate is clearly intended to go in a course of descent, it shall be construed an estate tail in the person to whom it is given for life." And by analogy to this rule,

If the donee of a power appoint by will to A., an object of the power for life, with remainder in tail to his first and other sons who are not objects, this shall be construed an estate tail in A. (*Pitt v. Jackson*, 2 Bro. C. C. 51 ; *Stacpoole v. Stacpoole*, 4 Dr. & War. 320.)

Doctrine of
cypres.

But the particular estate must be appointed for an estate of freehold ; a term of years determinable on lives will not suffice to found an estate tail upon (*Beard v. Westcott*, 5 Taunt. 393) ; and the appointment in remainder to the children must be to them in tail. (*Bristow v. Warde*, 2 Ves. jun. 336 ; *Hale v. Pew*, 25 Beav. 335.)

And although by this doctrine an estate may be carried otherwise than in the exact form and manner indicated by the testator, yet it must always be in favour of a class or part of a class of persons intended to be provided for by the testator. (*Monypenny v. Dering*, 2 D. M. & G. 145.) In that case, estates were devised to A. for life, remainder to his (unborn) first son for life, remainder to that unborn son's first son in tail male ; and the Lord Chancellor said he could not by the doctrine of *cypres* include any limitations which would provide for the second and other sons of the first grandson, contrary to the words of the will. In *Pitt v. Jackson*, however, the estate was carried in a different form and manner ; for the remainder was to the grandchildren as tenants in tail in common ; the tenancy in common was rejected. And see *Line v. Hall*, W. N. 1873, p. 198.

Restric-
tion.

18. But the rule is not to be applied except when the necessity of the case requires it : the Court will therefore apportion its application. In *Vanderplank v. King*, 3 Ha. 1, there was a devise to A., the testator's

Applica-
tion of the
rule appor-
tioned.

daughter, for life, and after her decease to all and every the child or children of A. for their respective lives, and after the decease and respective deceases of such child or children of A., to all and every the child or children of all and every such child or children of A., and the heirs of his, her, and their respective bodies, as tenants in common. Although the devise was to the children of A. as a class, the children of A. born in the testator's lifetime were held to take estates for life, and the estates devised to the children of an afterborn child were alone altered.

19. Where the estates created are excessive, the rule is analogous to that stated in s. 5 with reference to limitations to or conditions in favour of strangers to the power.

Excess by way of estate larger than authorized.

If there is a complete execution of the power, but something more is added, whether by way of limitation or otherwise, if the Court can see the boundaries, so as to separate the good from the bad, it will uphold the execution *pro tanto*.

“Where an act is done in execution of a power, though the party goes beyond the power, yet if you can sever what is beyond the power from what agrees with it (as for instance where the appointment is made subject to a limitation over, and the power did not authorize such a limitation), you may reject that part of the instrument, and let the appointment stand for the rest; but you must see clearly and distinctly what the person alleged to have executed the power had in view, and that he applied his mind in such a way, that you are satisfied that if he had rightly understood the extent of his power, he would so have executed it.”—*Per Lord Redesdale*, 2 S. & L. 332.

A lease for forty years under a power to lease for twenty-one years has accordingly been held good for twenty-one years. (*Campbell v. Leach*, Amb. 740; *Alexander v. Alexander*, 2 Ves. sen. 644.) And if the like power were exercised by a lease for twenty-one years, and upon the determination of that estate for a further term, it would be good *pro tanto*. But it will be otherwise if the execution be bad *ab initio* as transgressing the essence of the power—*e.g.*, if under a power to grant leases in possession for twenty-one years, a lease in reversion for forty years be granted, it will fail *in toto*.

A power to charge a particular sum, as 7,000*l.*, will be duly executed by a charge of a larger sum, as 8,000*l.*, and the excess only will be void. (Sug. Pow. 521, citing *Parker v. Parker*, Gilb. Eq. R. 168.)

20. The question, what is a sufficient execution so far as the appointor's intention is concerned, has been already considered (Execution of Powers, s. 23 *et seq.*). It remains to consider what is a sufficient execution in respect of the estates or interests given by the appointments: cases where such a question arises must necessarily be those only where the power is limited; for the donee of a general power has in effect absolute dominion over the property, subject to the power, and can deal with it by means of his power as fully as if he were seised in fee or absolutely possessed of it; but the donee of a limited power has a duty to perform towards the objects of his power, and cannot arrogate to himself rights of ownership beyond such as the author of the power may have given him. The Court has given effect to executions of powers in many instances where the intention to execute in accordance with the spirit of the power has been clear, but the method adopted has not been authorized by the terms of the power. In such cases, the appointments are often not legally good: for instance, they must be bad at law if

What is a good execution in respect of the interest given.

made to strangers, on trust for objects of the power ; for law would take no notice of the trust. But in equity, effect has always been given to appointments of this nature, on the ground that the appointment is good in equity. They are, therefore, so far as the interest of the appointees goes, good in cases where the whole subject-matter is under the control of the Court, and where the estates are legal, the Court aids the defective execution and compels the person who might take advantage thereof to convey the estate which the strictness of the law allows to devolve upon him. The cases afford many instances of one principle, namely, that

If appointments are in substantial accordance with the expressed intention of the author of the power, although not strictly in accordance *modo et formâ*, they will be good appointments in equity.

If the spirit is observed, the letter may to some extent be disregarded ; but the distinction between the fiduciary character of limited powers and the absolute dominion conferred by general powers must be remembered ; from which it results that although appointments may be good so far as the interests of the beneficial appointees is concerned, any additional dealings with the fund not necessary for the protection of those interests, and not warranted by the terms of the power, would be rejected.

Where there is a *general* power of appointment over a fund vested in trustees, and the donee appoints to certain persons beneficially, the original trustees are the persons to carry the appointment into execution, although the appointment be by will, and executors be appointed ; but if the donee appoints to trustees, those trustees are entitled to receive the funds to be held on the trusts

Who is to carry into execution the distribution of funds appointed under general power.

declared; and when a married woman makes a will in exercise of a power and appoints executors, inasmuch as she could only make her will by virtue of her power, and could only have appointed the executors for the purpose of administering the appointed property, she must be considered to have appointed the property to the executors. (*Re Philbrick*, 34 L. J. Ch. 368.)

Where appointor is a married woman.

It has not been decided whether this would apply to appointments by donees of limited powers; if land be settled to such uses as A. shall appoint among a class, he may appoint it to be sold, and give the proceeds to the class; but if a fund be vested in trustees on trust for such members of a class as A. shall appoint, and A. appoints to other trustees on trusts for that class, it has not yet been decided whether the original trustees would be justified in transferring the fund or not, the beneficial appointees being not *sui juris*: it would depend in a great measure on the terms of the power; but if it were merely in such terms as above stated, it would probably depend on the question whether the particular appointment is a reasonable or convenient one for the benefit of the appointees. The difficulty in which the original trustees would be placed would be to determine whether they obtained a valid discharge or not on parting with the fund.

Under limited powers,

21. Some of the cases which illustrate the last stated rule are here added.

In *Thornton v. Bright*, 2 M. & C. 230, real estate was settled on the marriage of A. to the use of himself for life, with remainder to the use of the children of the marriage for such estates and in such shares and with such limitations over and charged with such sums for the benefit of such children and in such manner and form as A. should appoint; personal estate was also vested in the trustees of the settlement on similar trusts. A. by his will appointed to trustees (not the trustees of

Cases illustrating the sufficiency of appointments in respect of the estate or interest created.

Appointment of legal es-

tates in
land to
trustees.

the settlement) on certain trusts for the benefit of a child of the marriage; this was held valid by the Vice-Chancellor as to the personalty but void as to the realty: on the latter point he was reversed, and the appointment was held good as to both.

Rent-
charge for
jointure.

From the direction in the decree (p. 255) that the trustees were to pay the rents to the child, the beneficial appointee, it would appear that the appointment was held absolutely good both at law and in equity: *sed qu.* The settlement was to the use of the children, in such manner and form, &c.; this could hardly authorize such an appointment as would displace the use and make the limitation run to the use of some one not a child. And in *Hervey v. Hervey*, 1 Atk. 561, it was attempted to execute a power to jointure by appointing the estate to trustees, on trust to pay an annual sum to the wife. Lord Hardwicke said that a power to jointure was a power to create a legal estate (Co. Litt. 36 b.), and was not well executed by creating a trust; but he considered the wife entitled to her jointure in equity, and decreed accordingly.

In equity, a power to appoint an estate authorizes a sale and a gift of the produce of the estate. (*Crozier v. Crozier*, 3 Dru. & War. 371; *Churchman v. Harvey*, Amb. 339.)

Appoint-
ment of
proceeds of
sale.

In *Kenworthy v. Bate*, 6 Ves. 793, land was limited to the use of such children of A. as he should appoint: an appointment by him to trustees on trust to sell and divide the produce among the children was held to be substantially a good appointment.

In *Fowler v. Cohn*, 21 B. 360, the Master of the Rolls said: "I find it quite settled by the authorities that a general power of disposition (among a class) of the whole property includes the power of sale, and consequently the power of sale is incidental to the power of disposition of the property in such manner and form, although the

original will does not expressly include a direct power of sale." And see *D'Abbadie v. Bizoin*, Ir. R. 5 Eq. 205.

A power to charge to an unlimited amount will authorize a like appointment. (*Long v. Long*, 5 Ves. 445.)

Power to charge.

And a power to appoint for such estate or estates in such parts, shares and proportions, and in such manner and form as the appointor should think fit, has been held to authorize an appointment to trustees for 500 years, on trust for objects of the power. (*Trollope v. Linton*, 1 S. & S. 485.) So a power to appoint and divide land enables a charge of money on the land. (*Roberts v. Dixwell*, Sug. Pow. 930; *Thwaytes v. Dye*, 2 Vern. 80.)

Execution, by creation of a term of years; of rent-charge.

In *Ricketts v. Loftus*, 4 Y. & C. Ex. 519, there was a limitation to the use of the children of A. for such estate or estates, and in such parts, shares and proportions, manner and form as A. should appoint; an appointment of a rent-charge to one child, and the estate, subject thereto, to another was held good.

A power to appoint the fee authorizes the appointment of any smaller interest (*Bovey v. Smith*, 1 Vern. 84), and also of any legal limitations within the scope of the power, which may be served out of the fee. (*Crozier v. Crozier*, 3 Dr. & War. 353, 370.)

Less estate than fee may be appointed.

A power to appoint estates to be purchased with money to arise from the sale of other settled estates is well exercised by an appointment operating directly on the original estates. (*Bullock v. Fladgate*, 1 V. & B. 471.)

Appointment of estate instead of proceeds of sale thereof.

A power to an executor to raise 500*l.* of the testator's estate, accompanied by a direction to see debts paid, gave a power of sale for those purposes. (*Wareham v. Brown*, 2 Vern. 154; *Bateman v. Bateman*, 1 Atk. 421; (and see *post*, Powers of Charging.)

To raise money.

(As to what powers of sale authorize, see *post*, Powers of Sale; and as to inserting powers of sale in mortgages under powers to mortgage, *post*, Delegation of Powers).

To charge a gross sum : interest. A power to appoint a sum of money, or to charge a gross sum on an estate, authorizes the appointment of interest thereon. (*R. v. Pogson*, 2 Madd. 457.) The appointment, however, of (say) 5000*l.*, part of a sum of 20,000*l.*, does not necessarily carry interest; the rule is, that if the appointment is vested and the sum appointed is severed from the residue, it will carry interest. (*Dundas v. Wolfe Murray*, 1 H. & M. 425.) But if the sums given are contingent on some future event, no interest is payable. (*Gotch v. Foster*, 5 Eq. 311.)

To appoint on such trusts. A power to appoint on *such trusts* as the donee pleases in favour of a class gives him a right to declare a trust for sale and to add such further trusts as may be necessary to effectuate his purpose, including therein the ordinary trustees' receipt clauses. (*Cowx v. Foster*, 1 J. & H. 30; but as to the receipt clause, see *Cox v. Cox*, 1 K. & J. 251.)

Receipt clause.

To convert. In a case where lands were settled, so as to be subject to the joint power of appointment of husband and wife among the children of the marriage for such estates and interests and in such manner as they should think fit, and in default, the estate was to be held in trust for all the children at twenty-one or marriage, equally, and the settlement contained a power of, but no trust for, sale; it was held that the appointors had power to convert the real into personal estate on appointment so as to bind the representatives of the appointees. (*Webb v. Sadler*, 14 Eq. 533; 8 Ch. 419.)

Mixed fund. A power of appointing a mixed fund of real and personal property to a class is well exercised by an appointment of the realty to one member of the class and the personalty to another: it is not necessary that each of the objects should have a part of each kind of property appointed to him, although the power is non-exclusive. (*Morgan v. Surman*, 1 Taunt. 289.)

A power of appointment among a class is well executed by an appointment to one object for life, with remainder to the other objects, or by cross gifts from one to another. (*Alloway v. Alloway*, 4 Dru. & War. 387; *Wilson v. Wilson*, 21 B. 25.)

Life estates with remainders over.

A power of appointment among children is well executed by an appointment to one for life with power to dispose of the capital by deed or will: for this in effect gives the whole beneficial interest and does not transgress any rule against perpetuity. (*Bray v. Bree*, 2 Cl. & Fin. 453.)

Appointment for life with general power of appointment.

And a like appointment to an object of the power for life, with a power of disposition by will only, is good, if such object was in esse at the time of the creation of the power. *Phipson v. Turner*, 9 Sim. 227. Secus, if it were not then in esse. (*Wollaston v. King*, 8 Eq. 165.)

An appointment to an object for her separate use may be made under a power to appoint personalty in such proportions as the donee shall direct. (*Alexander v. Alexander*, 2 Ves. sen. 640; *Dickinson v. Mort*, 8 Ha. 176.)

Separate use.

A power given to a married woman to appoint among her children, "with such directions or regulations for maintenance, education, and advancement," as she should please, was held improperly executed by an appointment to the husband, until the youngest child attained 21, in or towards the maintenance and education of all her children. (*Lloyd v. Lloyd*, 26 B. 96.) The ground of the decision was that the appointment was practically for the benefit of the husband, for he might claim the funds, whether there were any children or not. (*Hammond v. Neame*, 1 Sw. 35; and see *Chester v. Chadwick*, 13 Sim. 102.)

Power to direct maintenance.

A power in marriage articles to husband and wife to alter and vary the provisions of the articles as they should think fit, previous to the execution of the settle-

Power to alter and vary terms of marriage articles.

ment, did not authorize the insertion in the settlement of a power enabling the husband to jointure a future wife or charge portions for younger children of a future marriage. (*D. of Bedford v. M. of Abercorn*, 1 M. & C. 312.)

Power to
advance.

In *Roper-Curzon v. Roper-Curzon*, 11 Eq. 452, a power in a marriage settlement to advance to a son of the marriage part of the trust funds, "for placing or establishing him in any business, profession, or employment, or otherwise for his advancement or preferment in the world," was held to authorize payment of part of the trust fund to the trustees of a post-nuptial settlement made by a son in favour of himself and his wife and the issue of their marriage, neither the son nor his wife being entitled to any property producing an immediate income, and the son being engaged in study, preparatory to entering the legal profession. And as to a daughter, see *Lloyd v. Cocker*, 27 B. 645.

Power to
purchase
annuity.

In *Messeena v. Carr*, 9 Eq. 260, a power to trustees at their discretion to purchase an annuity for A. out of a trust fund, was held to be properly exerciseable by giving A. the whole fund or any part thereof. And an unlimited power to appoint dividends has been held to authorize an appointment of the capital. (*Phillips v. Brydon*, 26 B. 77.)

Different
species of
estate.

Although it has been decided that at law, where a freehold interest is authorized to be appointed, a different species of estate cannot be created, yet in equity such execution will be good. (Sug. Pow. 411.) A power to appoint among children, in such manner and proportions as A. pleases, authorizes an appointment of capital and income and the postponement of payment of the capital partly until the majority of all the children and partly until the death or marriage of one of them. (*Wilson v. Wilson*, 21 B. 25.)

Postpone-
ment of
payment.

CHAPTER VII.

DEFECTIVE EXECUTION.

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1. Executions of powers which are invalid at law by reason of their failure to comply with all the requisites of the power are aided in equity if there be a good consideration: the execution is not held actually good either at law or in equity, but the Court interferes and compels the person entitled in default of execution to make good the defect. (Sug. Pow. 532.) Defective executions of powers and defective surrenders of copyholds depend upon the same rules. The Court executes the intention of the settlor, either against his representatives or the person taking the estate in default of a valid execution of the power or surrender of the copyholds, where there is a

good consideration. If there be such a consideration the party taking the estate is not permitted to rely upon the defect; but the Court will effectuate the intention of the settlor, and, speaking generally, this equity is enforced, not against the settlor himself, but in his favour—that is, in execution of his intention, and at the expense of a third party. (*Per* Lord St. Leonards, *Ellis v. Nimmo*, Ll. and Go., 348.)

It is therefore, strictly speaking, inaccurate to say that a power is well executed in equity, although not at law; but as equity supplies the defect, it practically makes the execution good. (And see *ante*, p. 146 *et seq.*)

Difficult to
show any
principle
for the aid
afforded by
the Court.

Sir W. Grant, in *Holmes v. Coghill*, 7 Ves. 506, says that it is difficult to discover a sound principle for the authority the Court assumes for aiding a defective execution in certain cases. “If the intention of the party possessing the power is to be regarded, and not the interest of the party to be affected by the execution, that intention ought to be executed wherever it is manifested: for the owner of the estate has nothing to do with the purpose. To him it is indifferent whether it is to be exercised for a creditor or a volunteer. But if the interest of the party to be affected by the execution is to be regarded, why in any case exercise the power, except in the form and manner prescribed? He is an absolute stranger to the equity between the possessor of the power and the party in whose favour it is intended to be executed. As against the debtor it is right that he should pay. But what equity is there for the creditor to have the money raised out of the estate of a third person in a case in which it was never agreed that it should be raised? The owner is not heard to say that it will be a grievous burden and of no merit or utility. He is told the case provided for exists: it is formally right: he has nothing to do with the purpose. But upon a defect which the Court is called

upon to supply, he is not permitted to retort this argument, and to say, it is not formally right: the case provided for does not exist: and he has nothing to do with the purpose. In the sort of equity upon this subject there is some want of equality. But the rule is perfectly settled; and although perhaps with some violation of principle, with no practical inconvenience."

2. The rule is thus stated by Lord Alvanley:—

Whenever a man having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the Court will operate upon the conscience of the heir (or of the persons entitled in default), to make him perfect this intention. (*Chapman v. Gibson*, 3 Bro. C. C. 228.)

When equity will aid.

To the granting of the relief it is only necessary that the person executing the power defectively should have ability to raise the estate if the power had been properly pursued, and that the appointee should be one of the favoured classes. (Sug. Pow. 536.)

If the intention to pass the property subject to the power be clearly established, even although the intention to dispose of it under or by virtue of the power is not shown, still equity will give effect to the disposition, and hold that the property passes under the power. (*Carver v. Richards*, 27 B. 488, 495.)

In what cases.

Where the intention to pass the property, the persons to be benefited and the amount of benefit are sufficiently indicated, there is enough for the Court to act upon, and it will rectify any mere informality in the mode of carrying out that intention: but it will not do so if any of these be

wanting. (*Garth v. Townsend*, 7 Eq. 221; *Kennard v. Kennard*, 8 Ch. 227; and see *ante*, p. 146 *et seq.*)

Although
the donee
be a mar-
ried
woman.

It makes no difference if the donee of the power defectively executed is a married woman. *Dowell v. Dew*, 1 Y. & C. Ch. 345. "There is no doubt that the Court will aid the defective execution of a power in favour of a creditor or purchaser, though the donee of the power be a married woman. But the Court in such cases must be satisfied that the formalities which have not been observed are no more than matters of form, and that the donee of the power has not by their non-observance been deprived of any of the protection which a due exercise of the power would have afforded her: and the Court looks with especial jealousy on a transaction in which the wife may have acted under the influence of her husband." (*Thackwell v. Gardiner*, 5 De G. & Sm. 58, 65; *Hopkins v. Myall*, 2 R. & M. 86.)

Nature of
the defect
relieved
against.

3. Equity will only relieve against defects which are not of the essence of the power: it will never uphold acts which will defeat what the person creating the power has declared, by expression or necessary implication, to be a material part of his intention. (*Cooper v. Martin*, 3 Ch. 58.)

It is still competent to a settlor to make the nature and character of the instrument, by which the power he creates is to be executed, of the essence of the power, without observing which no execution shall be valid. (*Ibid.*)

Equity will supply defects which consist in the want of some circumstance required in the manner of execution, as the want of a seal or a sufficient number of witnesses; (see now 22 & 23 Vict. c. 35) or where the exercise has been by codicil before the Wills Act, attested by only one witness.

(*Morse v. Martin*, 34 B. 500.) (As to wills since the Act, see 1 Vict. c. 26, ss. 9, 10.) Or by will instead of by deed (*Sneed v. Sneed*, Ambl. 64), but it will not aid defects which consist in the omission or disregard of an essential part of the power.

In *Cooper v. Martin*, 3 Ch. 47, the proceeds of estates devised by A. in trust for sale were to be held on such trusts as A.'s wife should by deed, sealed and delivered before their youngest child attained 25, appoint, and in default, over. The donee appointed to all her children equally before the period expired, reserving a power of revocation: she afterwards by will, executed before but not coming into operation until after the youngest child attained 25, appointed to the eldest son. The execution was held to be invalid, and the defect to be of such a nature as the Court would not aid.

So, too, a covenant or agreement for renewal, or to grant a lease *in futuro*, by the donee of a power of leasing in possession will not be aided after the donee's death, so as to bind the remaindermen. In *Harnett v. Yielding*, 2 S. & L. 549, 559, the donee of a power of leasing for 21 years in possession at a rack rent made a lease, and thereby covenanted to renew for 21 years when applied to: this lease was surrendered, and an agreement endorsed thereon afterwards by the lessor to grant a fresh lease at any time the lessee should demand the same at a smaller rent.

Power of leasing improperly executed not aided against remainderman.

This was held bad, as being a fraud on the power, and not a mere defective execution which the Court would aid: the lessee offered to take a lease for 21 years if the lessor should so long live: but the Court refused that also. But it is doubtful whether the contract should not have been enforced so far as the lessor could legally execute the power. (*Dyas v. Cruise*, 2 J. & L. 460, *post*, p. 283.)

In a late case before the Lords Justices (*Ex parte The East London Railway Company*, Dec. 6, 1873,) a tenant for

life, with the statutory power of leasing under 19 & 20 Vict. c. 120 (*i.e.*, for 21 years in possession), agreed in writing to grant a lease for seven years, renewable at the expiration thereof for another seven. This agreement was carried into effect by a lease for seven years which contained no covenant for renewal, and during the continuance of this term the lessor died. The lessee, on his land being taken by the Railway Company under the Lands Clauses Act, claimed compensation in respect of a 14 years term. V.-C. Malins considered the claim to be made out. The Lords Justices reversed his decision, holding that the lease was the expression of the intention of the parties, and that the agreement, if it were still existing, was not in accordance with the terms of the power, and could not be aided, as the defect was essential.

It was also stated that no case had occurred in which the defective execution of a power, created by that Act of Parliament and to be executed in the manner pointed out by the Act, had been aided where the execution was not in accordance with the Act. L. J. James said he should hesitate long before granting aid in such a case. (*See post*, p. 278.)

In the last case the term in possession and the term in reversion would have been within the power : but the Court thought that it would have been bad notwithstanding ; and to the same effect was *Doe v. Lady Cavan*, 5 T. R. 567, where a lease had been granted under a leasing power, and a further term was granted under the same power to the same lessee : the two terms together did not exceed the number of years for which leases were authorized to be made. The case was decided on another ground : but the Judges thought this objection fatal. (*Sug. Pow.* 763.)

Unusual
covenants.

In *Sandham v. Medwin*, 3 Sw. 685, the Court refused to interfere to aid a lease in which unusual covenants were introduced, which purported to have been granted in

execution of a power to grant leases containing the usual covenants.

In *Lawrenson v. Butler*, 1 S. & L. 13, a tenant for life had power to lease with consent: he agreed to grant a lease, without having obtained the consent. The Court refused to aid.

A power to be executed by will cannot be executed by deed, and equity will not relieve, if the attempt is made. The creator of the power did not intend that it should be so executed: he intended it to be by will, or not at all; and it is impossible to hold that the execution of an instrument or deed, which, if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of the donee's death, can be considered in equity an attempt in or towards the execution of the power. (*Reid v. Shergold*, 10 Ves. 370, 380.)

Power to be executed by will cannot be executed by deed.

And equity will not interfere to set up an execution which would be a breach of trust. In *Mortlock v. Buller*, 10 Ves. 292, 317, trustees with a power of sale entered into a contract for sale without the necessary authority; specific performance was refused, and the Court would not aid the contract as a defective execution of the power. It might happen that after the trustees in such a case had entered into a due contract, binding all parties, circumstances might arise that might prevent them from carrying it into execution. In such a case, although the power might be gone, the contract would be made good in equity by the persons who had got an interest in the estate by the effect of that interest (p. 315); that is, the Court would aid the execution, and compel the persons legally seised to complete the legal title. And see *Ord v. Noel*, 5 Madd. 438, and cf. *Dance v. Goldingham*, 8 Ch. 902.

Equity will not aid a breach of trust.

On the same principle, where trustees had a power to grant new leases on the expiration or surrender of existing

leases, “determinable on the decease of three lives to be named in every such new lease, but not for more lives at one and the same time;” and they demised to A. B. for 99 years if three persons should so long live, and thereby covenanted to put in another life on certain conditions if any of the three should die: it was held to be a breach of trust, and the Court would not interfere to aid its performance. (*Bellringer v. Blagrove*, 1 De G. & Sm. 63.)

Non-execution not aided.

4. The Court will not aid the non-execution of a power, since it is against the nature of a power which is left to the free-will and election of the party whether to execute it or not; (*Tollet v. Tollet*, 2 P. W. 498) unless such non-execution has been procured by fraud (*semble*).

It will not therefore uphold as a valid execution an imperfect contract for sale even in favour of a purchaser for valuable consideration—*e.g.*, a mere parol contract for the sale of lands, the only evidence of which is to be deduced from the conduct of the parties; except on the ground that it would be a fraud on the part of the person who might insist on the Statute of Frauds, to insist upon it; and this would not apply to remaindermen. *Morgan v. Milman*, 3 D. M. & G. 24; *Shannon v. Bradstreet*, 1 S. & L. 52, 72; *Blore v. Sutton*, 3 Mer. 237; unless such remainderman has lain by and allowed money to be expended on the faith of the validity of the execution. (*Stiles v. Cooper*, 3 Atk. 692.)

Although due to accident.

The Court will not supply execution on the ground that the donee has been prevented by accident from executing the power.

In *Buckell v. Blenkhorn*, 5 Ha. 131, 141, V.-C. Wigram says: “If the argument urged before me in this case be

once admitted, it seems impossible to stop short of the conclusion that the donee of a power should in all cases be liberated from its restraint, whenever he *bonâ fide* intended to execute the power, but could not at a given moment ascertain what those restraints were, and death or accident prevented his compliance."

And the Court will not hold an execution to be intended because the donee was under a mistaken apprehension that by leaving the power unexecuted, certain persons whom he desired to benefit would take; the expressed intention being not to make any appointment. (*Langslow v. Langslow*, 21 B. 553, *ante*, p. 163.)

But if a person be fraudulently prevented from doing an act, the Court will consider it as if that act had been done. Lord Eldon (1 J. & W. 97) states that in *Luttrell v. Olmius*, 11 Ves. 638, Lord Waltham, a tenant in tail, having been fraudulently prevented from suffering a recovery, the estate was treated as if the recovery had been suffered, though in favour of a volunteer, and against one not a party to the fraud. Yet in the case before him (*Middleton v. Middleton*, 1 J. & W. 94) he refused to grant an injunction to restrain a husband from preventing his wife's solicitor from having access to her with a deed of appointment: and he said, "Suppose the lady should die without executing the deed, would it be possible for the Court to consider it done, when it does not appear that she gave instructions for it?" (but she did give such instructions, see p. 98).

But execution will be supplied if it was prevented by fraud (semble).

In *Vane v. Fletcher*, 1 P. W. 352, 355, the Court would not supply a surrender of copyholds against the heir, although it was urged that the testator had done all in his power to surrender, and had made a letter of attorney to J. S. for that purpose, but the steward refused to accept it. The Court thought this a lucky accident in favour of the heir, which equity ought not to deprive

him of. "But if the heir-at-law had himself done anything to have prevented the acceptance of the surrender, that had been material."

Persons in whose favour equity interferes.

5. Where there is a defective execution of a power, be it either for payment of debts or provision for a wife or children unprovided for, the Court will equally supply the defect. (*Tollet v. Tollet*, 2 P. W. 489.)

The character of purchaser, wife, creditor, child, must be borne by the party claiming relief in relation to the donee of the power, and not to the person creating the power. (Sug. Pow. 537; but see *contra*, *Wilkes v. Holmes*, 9 Mod. 465.)

But there is a distinction between persons claiming for meritorious and for valuable consideration; and good consideration is (*semble*) included in "valuable." The supplying the execution of a power which is defective, and the supplying a surrender of copyholds, go hand in hand; wherever the Court will supply the surrender, it will supply the defective execution. (*Chapman v. Gibson*, 3 Bro. C. C. 228, 231.) In *Jeffreys v. Jeffreys*, Cr. & Ph. 138, A. made a voluntary settlement of freeholds and covenanted to surrender copyholds to the like uses for the benefit of his daughters. The Court would not supply a surrender. It follows that a mere agreement or covenant to execute a power in favour of persons claiming for meritorious consideration will not be aided in equity. (*Sayer v. Sayer*, 7 Ha. 387.)

Agreement for meritorious consideration not aided.

Otherwise, if it be a valuable consideration.

But it will be otherwise if the appointees or covenantees be purchasers for valuable consideration. When a person enters into a contract for the execution of a power for valuable consideration, but does not carry it into effect and exercise the power, the Court will supply the defect.

In *Re Dyke's Estate*, 7 Eq. 337, lands stood limited to such uses as D. should by deed appoint, and subject thereto to the use of D. and the heirs of his body, with remainders over. D. was absolutely entitled to other lands. A railway company required part of the settled and part of the other estates. By agreement not under seal, after reciting that D. was owner of lands, part of which (specified in the schedule thereto) was required by the company, and the purchase-money and compensation to be paid to D. had not been ascertained, and that it had been agreed to refer these matters to arbitration, the parties thereto bound themselves to abide by such arbitration. The schedule comprised all the land required by the company without distinction of title, and a single sum was awarded as the purchase-money. Before the execution of any conveyance D. died. The Master of the Rolls held that the contract operated as an execution of the power in equity.

But equity will not aid, if there be no valid and binding contract. (*Morgan v. Milman*, 3 D. M. & G. 24.)

If the donee of a testamentary power of appointment among children covenant on the marriage of one of them to execute his power in his favour, and die without doing so, the covenant will operate as a defective execution, or will at any rate be satisfied by leaving the money to devolve as unappointed. (*Thacker v. Key*, 8 Eq. 408. But see *post*, Fraudulent Execution.)

Covenant
to appoint
by will.

6. The Court interferes in favour of purchasers, because it is unjust not to give them the benefit of their contracts. In order to constitute a purchaser in whose favour a defective execution of a power can be aided, there must be consideration, and an intention to purchase

Purchasers
for valuable
considera-
tion.

either proved or presumed. (*Sergison v. Sealey*, 2 Atk. 418.)

In *Hughes v. Wells*, 9 Ha. 749, 769, it was held that the expenditure by a husband of his wife's money in the maintenance of their joint establishment did not furnish any consideration to the wife, and (assuming that a transfer by a husband of his wife's legacy into her name and the carrying the income of it to her account might amount to consideration) it certainly did not prove any intention to purchase.

It makes no difference whether the purchasers be purchasers of the entirety or of part only. The defective execution will be aided *pro tanto*, if necessary—*e.g.*, the want of a surrender of copyholds was supplied in favour of a mortgagee in *Jennings v. Moore*, 2 Vern. 609; and in *Dowell v. Dew*, 1 Y. & C. Ch. 345, it was held that an agreement to grant a lease entered into a short time before the expiration of the existing lease by the donee of a power of leasing in possession only might under certain circumstances be aided in equity.

In *Long v. Rankin* (Sug. Pow. 900), C. J. Abbott says: "A lessee is in law and reason considered as a purchaser, even if he takes at the best rent the land be worth at the time, because he forms his engagements and regulates his affairs upon the faith of his lease, and often expends his money in the improvement of the land, in confidence that he shall reap the benefit of his expenditure by the enjoyment of his term." And a person to whom the donee of a power of leasing had agreed to grant a lease, might be aided, although the term had not commenced (if that were not contrary to the power), and although he had therefore been put to no expense, for his equity depends not on part performance, but on his contract.

Campbell v. Leach, Ambl. 740, was the stronger case of a lessee who had been let into possession under a defectively executed lease, and had on the faith of such lease expended large sums. But the mere relation of landlord and tenant makes the tenant a purchaser for valuable consideration to the extent of his lease, and he has all the advantages of such purchaser; and every circumstance which would avail a purchaser in fee simple as a purchaser for valuable consideration would equally avail a lessee for years to the extent of his term. (*Per* V.-C. Malins, 16 Eq. 525.)

7. Where a testator shows an intention to provide Creditors.
for the payment of his debts, the Court will supply a defective execution. (*Chapman v. Gibson*, 3 Bro. C. C. 229.)

“This is not to be confounded with the case of the heirs being disinherited by a will not duly executed: there is no will at all: the Court cannot see that there is such an instrument; but wherever there is such a power it has been executed.” (*Ibid.*) The testator in that case had devised all his estate, having only copyholds not surrendered to the use of his will.

A limited power of appointment among a class cannot of course form part of the appointor's assets, whether he execute his power or not.

But both real and personal estate over which a man has a general power of appointment becomes assets for the payment of his debts, if the power has been validly exercised in favour of volunteers. (*Fleming v. Buchanan*, 3 D. M. & G. 976; *Jenny v. Andrews*, 6 Madd. 264; *Williams v. Lomas*, 16 B. 1.) The donee of the power having by his appointment displaced the title of those taking

Property when actually appointed becomes assets for payment of debts.

estates subject to the power, and so rendered the property his own absolutely, the Court treats it in like manner, follows this out to all its legitimate consequences, and treats his rights acquired under a general power as equivalent to absolute ownership. (*Per V.-C. Wood*, 2 K. & J. 681.) As to this, and as to the question of the liability of estates appointed by married women to the payment of their general engagements, see *ante*, p. 202 *et seq.*

But the appointed property is the last to be applied in administering the appointor's estate, and is only used so far as is necessary to supply the deficiencies left by the other assets. (*Silk v. Prime*, 2 W. & T. L. C. 121.) And, as before stated, unless the power is executed, the property subject to it cannot be made assets: equity cannot supply non-execution. (*Holmes v. Coghill*, 7 Ves. 499.)

Purchaser
has better
equity
than cre-
ditor.

And the equity of a purchaser from a party taking under a voluntary deed of appointment is preferred to that of general creditors, having no specific charge. (*George v. Milbanke*, 9 Ves. 190.) The purchaser who pays a consideration to the voluntary appointee may constructively be held to be in the same situation as if he had in the first instance paid it to him by whom the power was executed. (*Daubeny v. Cockburn*, 1 Mer. 626, 638.)

Exception
in cases of
testa-
mentary
appoint-
ments,

But this does not apply to purchasers of shares appointed by will: they are in the same position as purchasers for value of a legacy, and are subject to the same equities in respect thereof as the vendor: and therefore must refund it if necessary for the payment of debts. (*Jennings v. Bond*, 2 J. & L. 720.)

Creditors
cannot
have ap-
pointments
to volun-
teers aided.

Nor can creditors claim to have the defective execution of a power supplied in their favour, when the appointee is a volunteer, and therefore would not be himself aided. This does not appear to have been expressly decided, and in *Holmes v Coghill*, 12 Ves. 206, Lord Eldon seems to

think it might be done. But Lord St. Leonards (Pow. 540-1) considers that the limits of the law on this head are contained in the decided cases. "Where the fund is effectually given to a stranger, equity considers him a trustee of it for the creditors, and the remainderman has no ground of complaint, because the power is legally executed. Where a defect is supplied for the appointee, the relief has at least the merit of effectuating the intention of the person executing the power, although at the expense of the remainderman; but if this relief should be afforded in favour of creditors where the fund is not given to them, the same hardship would be imposed on the remainderman, and at the same time the intention of the donee of the power would be defeated. Upon this head of equity it is clearly established that the interests of the remainderman shall only be sacrificed to the intention of the donee of the power expressed in favour of a person from whom a valuable consideration moved, or in whose person a good consideration existed. The first point to be established is the intention of the person executing the power, which in this case is not merely wanting, but his intention expressly was that his creditors should not have the fund. The common equity in favour of creditors, where the fund is given to others, does not arise until the power is legally executed."

The usual rules as to purchasers for valuable consideration without notice apply to persons taking estates by means of the execution of powers as well as by ordinary conveyances. If therefore a power be executed in such a manner as not to be valid at law in favour of A., and be afterwards validly executed in favour of B., B.'s title will prevail if he had no notice of A.'s claim, for he will have got the legal estate and an equal equity.

But this does not apply to persons who take subject to and in default of appointment: in most cases they are

Rights of
purchasers
without
notice.

purchasers, yet equity sets up defective executions to their detriment, because they take subject to the power.

- Charities. 8. A power well exercised in all other respects will, in favour of charities, be deemed to be an effective execution of the power, although the form in which the power has been exercised has not conformed to the requisitions imposed by the instrument creating or giving the power. *Innes v. Sayer*, 3 Mac. & G. 620 (and cases cited at p. 610).

In *Attorney-General v. Burdet*, 2 Vern. 755, it was held that an appointment by a tenant in tail to a charity should bind the remainderman, and it was said that the Statute of Charitable Uses (43 Eliz. c. 4) supplies all defects where the donor is of capacity to dispose, and hath such an estate as is in any way disposable by him, whether by fine or common recovery.

Mr. Tudor (*Charitable Trusts*, 2nd ed. 37) says that a most liberal construction was put on this statute by the Courts, upon the ground that the legislature was supposed to have intended thereby to cure all defects and omissions in point of form in instruments by which property was given to charitable purposes.

It is clear that the Statute of Mortmain (9 Geo. 2, c. 36) does not repeal this Act; but appointments to charitable uses must conform to the directions contained in it. (*Sug. Pow.* 208).

Persons
claiming
for meri-

9. Equity will interpose in favour of persons for whom there is a natural obligation to make

provision. *Chapman v. Gibson*, 3 Bro. C. C. 228. torious
considera-
tion.

In aiding the defective execution of a power, either for a wife or child, its being intended for a provision, whether voluntary or not, will entitle the Court to carry it into execution. *Hervey v. Hervey*, 1 Atk. 567.

The Court will not inquire into the *quantum* of the provision: it is sufficient that the testator is acting in discharge of moral or natural obligations, and it is very difficult for the Court to enter into such an inquiry: the father must be the best judge. 3 Bro. C. C. 230. *Quantum*
of provi-
sion.

Thus, a surrender of copyholds has been supplied in favour of a wife, although she had other provision (*Smith v. Baker*, 1 Atk. 385); and although her interest was only limited, and the surrender could not be supplied in favour of those in remainder (*Marston v. Gowan*, 3 Bro. C. C. 170), and a defective execution has been aided in her favour. *Tollet v. Tollet*, 2 P. W. 489.

A defective execution has been aided in favour of a child, although the effect has been to put a younger child in a better condition than an elder (3 Bro. C. C. 230), and also in favour of a sister so as to take away the property from a brother, if he be otherwise provided for. *Lucena v. Lucena*, 5 B. 249; *Hume v. Randell*, 6 Madd. 331.

In *Morse v. Martin*, 34 B. 500, the power was to appoint 3000*l.* among children by deed or will duly executed, and attested by two credible witnesses: the donee, by his will before the Wills Act appointed to all his children equally: next day, by codicil attested by one witness only, he revoked the appointment, and appointed 1000*l.* on certain trusts for his daughter's benefit, and the remaining 2000*l.* to his three sons. The Court supplied this

defect in the attestation, to the prejudice of the three brothers, since they were also provided for.

Who are
not within
the con-
sideration.

10. But Equity extends its aid only in cases where there is some natural or moral obligation on the part of the donee of the power to provide for the persons in whose favour the defective execution has been made.

No aid therefore will be afforded to a husband (*Moodie v. Reid*, 1 Madd. 516, 9 Ha. 769); a grand-child (*Kettle v. Townshend*, 1 Salk. 187, in H. of L.; *Perry v. Whitehead*, 6 Ves. 544); a natural child or cousin (*Tudor v. Anson*, 2 Ves. sen. 582); a brother or sister (*Goodwyn v. Goodwyn*, 1 Ves. sen. 228); a nephew or niece (*Marston v. Gowan*, 3 Bro. C. C. 170); a volunteer, even although such volunteer be the creator of the power (see note to *Watts v. Bullas*, 1 P. W. 60). In *Sergison v. Sealey*, 2 Atk. 415, a woman had a general power of appointment by deed or writing attested by three witnesses over a sum of money. By her marriage settlement she covenanted that 2000*l.* thereof should be held for the benefit of her husband, and 2000*l.* for her own separate use, but the settlement was attested by two witnesses only. The Court aided the execution so far as the husband was concerned, but refused to aid it as to her own 2000*l.*, for that was based on no consideration, and was merely voluntary.

When the
obligation
to provide
is equal.

11. And if the donee of the power be under an equal obligation to provide for the persons who would take in default of appointment (or for the heir in case of copyholds) and for the objects of the

defective appointment, Equity will not interfere, unless the heir or persons taking in default are otherwise provided for.

“The principle must be this, that the testator being under an obligation to do an act, we will compel the heir to perfect it ; but we will not compel him to fulfil an obligation at the expense of another ; and if the testator has totally forgot to make any provision for his eldest son, this shall be an answer to the claim of the wife or other children.” *Chapman v. Gibson*, 3 Bro. C. C. 230.

This Court will not supply a surrender against the heir unprovided for ; but it considers the parent the best judge of the provision of that heir, and will not examine the sufficiency of the provision, unless perhaps in a case in which it may be challenged as illusory. *Braddick v. Mattock*, 6 Madd. 361. But the heir must of course be heir in blood, and not *hæres factus* (*Smith v. Baker*, 1 Atk. 385); and (*semble*) not merely heir in blood, but a child ; for there is no obligation to provide for any heirs other than children ; and as a defective execution will not be aided in favour of a grandchild (for instance), it would seem to follow that his want of provision should be no bar to an application to the Court to aid a defective execution against him ; although in *Rodgers v. Marshall*, 17 Ves. 294, the Master of the Rolls seems to have thought otherwise.

The Court will not supply a defect in favour of a daughter to the prejudice of other persons standing in the same relationship, unless those others are otherwise provided for. *Morse v. Martin*, 34 B. 500 ; *Lucena v. Lucena*, 5 B. 249 ; *Hume v. Randell*, 6 Madd. 331.

12. Powers of all sorts, with the one exception next mentioned, can be aided ; it is only requisite that there should

What
powers can
be aided.

be a sufficient consideration; and, if the defect consist in the execution being merely a contract to execute, the contract must be a binding one. Thus, in *Wilkie v. Holmes*, 1 S. & L. 60, n., a power of charging was aided; and see *Wade v. Paget*, 1 Bro. C. C. 368.

What
cannot.

It seems, however, that enabling powers created by statute cannot be aided. Where an enabling or restraining statute creates or puts a limit upon a power, or with a view to perpetuate an estate in a particular descent, from public policy relaxes the law of perpetuity, and gives powers to persons for ever in succession, such cases do not fall within the jurisdiction of the Court, but wholly depend on the law which created them. (Sug. Pow. 564.)

Lord Mansfield says (Cowp. 267, 2 Burr. 1146) that powers to a tenant in tail to make leases under the statute of 32 H. 8, if not executed in the requisite form, no consideration ever so meritorious will avail. So with respect to powers under the Civil List Act, powers under particular family entails, as in the case of the Duke of Bolton, &c., equity can no more relieve from defects in them than it can from defects in a common recovery; *sed vide Luttrell v. Olmius*, mentioned 11 Ves. 638, by Lord Eldon, where a recovery was supplied in favour of a volunteer, the tenant in tail having been fraudulently prevented from suffering it. If equity has jurisdiction to *supply* a recovery, it would seem that it could also aid a defect in suffering one; there does not appear, however, to be any case reported in which it has been done.

It is to be observed, too, that in 12 & 13 Vict. c. 26 (*post*, p. 285) leases granted defectively in execution of powers created by Act of Parliament are expressly enumerated; and although it has been doubted whether this statute applies to the Leases and Sales of Settled

Estates Act (19 & 20 Vict. c. 120), it would appear that it must do so. The fact that the power of leasing given to a tenant for life by s. 32 of the last-mentioned Act is subsequent in date to the enabling Act, 12 & 13 Vict. c. 26, can make no difference. For uses created by the testamentary capacity given by the Statute of Wills (32 H. 8) are within the statute of 27 H. 8. "And it is frequent in our books that an Act made of late time shall be taken within the equity of an Act made long time before." *Per Lord Coke (Vernon's Case, 4 Rep. 1, at p. 4)*; and see *re Perrin*, 2 Dru. & War. 147.

13. It was at one time doubted whether equity would aid the defective execution of leases at all so as to bind the remainderman; or even so as to enable the lessee to obtain specific performance from the lessor of the lease agreed to be granted so far as such lease was *intra vires*. It appears now to be well settled (apart from the statutory aid hereafter mentioned, p. 285) that if there be no fraud upon the remainderman, equity will regard the lessee as a purchaser *pro tanto*, and will relieve against any mere formal defect in the execution of a power of leasing as of any other power. "There are no doubt many cases in which the Courts of Equity have compelled remaindermen to carry into effect contracts into which tenants for life with a power have entered; but those cases have, I apprehend, proceeded upon this principle, that the contract was to be considered as the defective execution of the power, which, therefore, a Court of Equity was justified in making good against the remainderman. But if this be the ground of those decisions, the first question to be considered is, could the tenant for life himself have done what the remainderman is called upon to perfect?" *Per Lord Cottenham, Clark v. Smith*, 9 Cl. & F. 141.

Defective execution of powers of leasing aided.

In *Campbell v. Leach*, Ambl. 740, there were nine objec-

tions taken to the lease ; the fourth and fifth were, “ that the lease exceeded the power in the term granted being for twenty-six years, and the power only enabling a lease for twenty-one.” “ That it was not a lease in possession, but in reversion or *futuro*.”

L. C. J. De Grey said that at law the lease could not be supported or apportioned ; but how was it in equity ? The power was “ for the benefit of tenant for life and the remainderman. If executing this power is for the benefit of the remainderman, it should receive a liberal construction ; but if tenant for life invades the interest of the remainderman, in order to benefit his own only, it should have another construction.” In that case it was not proved that an old lease had been surrendered ; if this had not been done, the lease would have contravened the power in being in reversion ; but as it had been abandoned, it was taken as if it had been surrendered ; and the lease was supported for twenty-one years, the excess being rejected.

In *Shannon v. Bradstreet*, 1 Scho. & Lef. 52, an agreement by tenant for life, with power of leasing, to grant a lease in accordance with the terms of the power, was enforced against the remainderman as an equitable execution of the power. Lord Redesdale points out (p. 61) that powers of leasing ought not to receive a less liberal construction as against the remainderman than powers of jointuring and the like, which are a mere burden upon him. In the case of powers to make leases at the best rent that can be obtained, it is evident that the author of the power looks to the benefit of the estate, and that the power is given for the benefit both of the tenant for life and of all persons claiming after him ; for where the tenant for life can give no permanent interest, and his tenant is liable every day to be turned out of possession by the accident of his death, it is hard to procure sub-

stantial tenants ; and therefore it is beneficial to all parties that the tenant for life should have power to grant such leases.

In *Dowell v. Dew*, 1 Y. & C. C. C. 345, the donee of a power of leasing for 21 years in possession leased for 14 years to D., and about a year and a half before the expiration of the lease, agreed to grant D. a renewed lease on the same terms and for the same period as before. The lessor survived the period at which the first lease expired : the lessee remained in possession without getting a new lease, but doing acts on the premises referable only to the agreement. This agreement was held to be a valid execution of the power. It is to be observed that the lessor lived until she could have granted a new lease under her power : *semble*, it would have been otherwise, if the lessor had died before the expiration of the first lease (p. 356).

But, in order to bind the remainderman, there must be a valid and binding contract. *Morgan v. Milman*, 3 D. M. & G. 24.

And it appears that the principle on which the Court interferes in cases of part performance of contracts, and establishes them against owners in fee, on the ground that it would be inequitable to allow the Statute of Frauds to be pleaded, would not apply to remaindermen. (*Ibid.* 33). But it would be otherwise, if after the death of the tenant for life, the remainderman were to lie by and allow the tenant to carry out improvements and expend money. *Stiles v. Cowper*, 3 Atk. 692 ; *Shannon v. Bradstreet*, 1 S. & L. 73. In that case the remainderman came of age in 1792, but took no step to avoid the lease until 1801, and permitted the tenant to enjoy during all the intermediate time, and admitted that he knew of the agreement, but considered it not binding on him as remainderman : he never told the tenant so, but

Remain-
dermen
lying by
and allow-
ing tenant
to expend
money.

allowed him to continue in possession and lay out money in improvements : the lease was held binding on him.

Lessee has no claim against estate of tenant for life, except on any express covenants.

Lord Redesdale also refused to allow him to turn round the lessee to seek compensation against the assets of the tenant for life, on the ground that he had lain by for too long a period and was not then to be allowed to vary the rights of others.

But it seems that, in the absence of any covenant for quiet enjoyment or the like, by the tenant for life, the lessee would have no remedy against his estate by way of damages : that would be a decree merely for damages and not compensation for the benefit the tenant for life's estate had received : for it is the estate of the remainderman that is benefited. *Blore v. Sutton*, 3 Mer. 237 ; and *Stamford v. Omy*, cited 1 S. & L. 65.

But the lessee can recover damages on the lessor's covenants, if any such were entered into. In *Vernon v. Ld. Egremont*, 1 Bl. N. S. 554, a tenant for life had granted leases not in conformity with his power, and his lessees had expended money and paid fines : he then died, having made the next tenant for life his residuary legatee. It was held that before the residue was paid over to the legatee, he must either confirm or procure to be confirmed the leases, or otherwise indemnify the executor against all claims and costs in respect thereof.

Specific performance of contract to lease against donee of power.

14. Although Lord Redesdale, in *Harnett v. Yielding*, 2 S. & L. 549, refused to decree specific performance of so much of an agreement to grant a lease as was within the terms of the power, it seems to be the better opinion that—

If there be a *bond fide* intention to execute the power and that contract cannot be carried into effect, the interest of the tenant for life

shall be bound to the extent to which he is able to bind it, and he shall be decreed to perform his contract so far as it is in compliance with the terms of the power.

In *D. d. Bromley v. Bettison*, 12 East, 304, the donee of a power of leasing for 21 years in possession, reserving the best rent, made a lease for 21 years at a rack-rent, but containing a covenant for renewal during the life of the tenant for life for 21 years, at the same rent and terms. The lessor having died, the lease was held binding on the remainderman, notwithstanding this covenant. It is not said whether specific performance of this covenant could have been enforced, or whether a lease granted in pursuance of it would have been binding on the remainderman: *semble*, that it would. Lord Ellenborough said (p. 310) that it was objected that the covenant for renewal had a tendency to induce the lessor to run the question on the *quantum* of rent very closely: for if he renewed at the end of 20 years from the first granting of the lease, the remainderman would have a lease fixed on him for 21 years from that time, reserving less than the best rent which then could have been reserved: the answer is, that if the fact were so, the lease would be void and the remainderman might bring his ejectment and recover the premises.

In *Dyas v. Cruise*, 2 J. & L. 460, a tenant for life, with power to lease at the best rent, agreed to demise for a term warranted by the power, but at a rent which appeared afterwards not to be the best rent. Lord St. Leonards decreed partial performance, and directed the tenant for life to demise to the extent of his interest. He said (p. 487) that Lord Redesdale, in *Harnett v. Yielding*, had refused partial performance, on the ground

that the lessee knew the party had only a limited power of leasing and intended to execute it, and that there was no mutuality. "I doubt whether that can be maintained as the law of the Court, when there is no fraud in the transaction. If there is a *bond fide* intention to execute the power, and that contract cannot be carried into effect, I do not see why the interest of the tenant for life should not be bound, to the extent he is able to bind it, unless there be some inconvenience." In *Graham v. Oliver*, 3 B. 128, the Master of the Rolls, alluding to the difficulty in these cases, said that the Court had thought it right in many cases to get over these difficulties for the purpose of compelling parties to perform their agreements, and that it was right they should be compelled to do so, where it could be done without any great preponderance of inconvenience. If, therefore, it had appeared in the case before him that the lessee was aware that the lease was to be made to him by means of the execution of a power, then, although the rent were not strictly the best, yet he should have been of opinion that, it being a fair transaction, the lessee would be entitled to a performance of the contract to the extent of binding the life estate of the lessor: as in *Lawrenson v. Butler*, 1 S. & L. 19, where an incumbent contracted with a tenant in tail in remainder for the purchase of the advowson, and on the faith of that contract, built a better house on the glebe: afterwards the person in whom the life estate was vested refused to join in making a tenant to the *præcipe*, in order that a recovery might be suffered; and, consequently, no sufficient conveyance could be made of the advowson. But Lord Thurlow held the purchaser entitled to a partial performance of the contract; for that on the faith of it he had expended money on the glebe.

Purchaser
with notice
is bound.

And a purchaser under a power of sale from a tenant

for life is bound during the life-tenant's life by all the terms of a lease granted by such tenant for life under a power of leasing, although they be not authorized by the power, if he have notice of the lease; he is bound to do any act which his vendor might have been compelled to perform.

In *Taylor v. Stibbert*, 2 Ves. jun. 437, a tenant for life with power of leasing granted leases for lives, and bound himself upon the dropping of a life to grant a new lease, with the same provision for renewal on the death of any person to be named in any future lease. He afterwards sold under a power of sale, and the purchaser had notice of the lease. Although the power was exceeded, it was held that the purchaser must specifically perform the covenant, if a life dropped during the lessor's life. (See the case observed on, Sug. Pow. 765-7, and Dart. V. & P. 807, 4th ed.)

The aid afforded in equity to leases granted under powers depended on the consideration whether the defect was one of form or of substance. The Legislature has, however, interfered and affords wider aid to defective leases under powers.

Statutory
aid to de-
fective
leases.
12 & 13
Vict. c. 26.

The preamble of 12 & 13 Vict. c. 26, states that, "Whereas, through mistake or inadvertence on the part of persons granting leases, and through ignorance on the part of lessees of the titles of persons from whom leases are accepted, leases granted by persons having valid powers of leasing are frequently invalid as against the successors in estate of such persons by reason of the non-observance or omission of some condition or restriction, or by reason of some other deviation from the terms of such powers: And whereas leases granted in the intended exercise of such powers are sometimes invalid as against the successors in estate of the persons granting the same by reason that at the time of granting

the same the person granting the lease could not lawfully grant such lease, although at a subsequent time and during the continuance of his estate in the hereditaments comprised in such lease, he might have granted the same in the lawful exercise of such power: And whereas it is expedient that provision should be made for granting relief in the cases aforesaid, in manner hereinafter mentioned :

Leases invalid owing to deviation from terms of power deemed contracts in equity for such leases as might have been granted.

“Sect. 2. It is enacted, That where in the intended exercise of any such power of leasing as aforesaid, whether derived under an Act of Parliament or under any instrument lawfully creating such power, a lease has been or shall hereafter be granted, which is by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled after the determination of the interest of the person granting such lease to the reversion, or against other the person, who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made *bond fide* and the lessee named therein, his heirs, executors, administrators, or assigns (as the case may require) have entered thereunder, shall be considered in equity as a contract for a grant at the request of the lessee, his heirs, executors, administrators, or assigns (as the case may require) of a valid lease under such power to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power, and all persons who would have been bound by a lease lawfully granted under such power, shall be bound in equity by such contract: Provided always, that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators, or assigns,

shall be entitled by virtue of any such equitable contract as aforesaid to obtain any variation of such lease where the persons who would have been bound by such contract are willing to confirm such lease without variation.

“3. The acceptance of rent under any such invalid lease as aforesaid shall, as against the person so accepting the same, be deemed a confirmation of such lease. (This section is repealed by 13 Vict. c. 17, *infra*.)

Acceptance
of rent.

“4. Where a lease granted in the intended exercise of any such power of leasing as aforesaid is invalid by reason that at the time of the granting thereof the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him in the lawful exercise of such power, then and in every such case such lease shall take effect and be as valid as if the same had been granted at such last-mentioned time and all the provisions herein contained shall apply to every such lease.

Leases in-
valid at
granting
valid if
lessor con-
tinues owner
until he
could
grant.

“5. When a valid power of leasing is vested in or may be exercised by a person granting a lease, and such lease (by reason of the determination of the estate or interest of such person or otherwise), cannot have effect and continuance according to the terms thereof, independently of such power, such lease shall for the purposes of this Act be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease.

What is an
intended
exercise of
a power.

“6. Nothing in this Act contained shall extend or be construed to prejudice or take away any right of action or other right or remedy to which but for the passing of this Act the lessee named in any such lease as aforesaid, his heirs, executors, administrators, or assigns, would or might have been entitled under or by virtue of any

Saving
rights of
lessors and
lessees
under
covenants.

covenant for title or quiet enjoyment contained in such lease on the part of the person granting the same, or to prejudice or take away any right of re-entry or other right or remedy to which but for the passing of this Act the person granting such lease, his heirs, executors, administrators, or assigns, or other the person for the time being entitled to the reversion expectant on the determination of such lease, would or might have been entitled for or by reason of any breach of the covenants, conditions, or provisoes contained in such lease, and on the part of the lessee, his heirs, executors, administrators, or assigns, to be observed and performed.

Act not to
extend to
certain
leases.

“7. This Act shall not extend to any lease by an ecclesiastical corporation or spiritual person, or to any lease of the possessions of any college, hospital, or charitable foundation, or to any lease where before the passing of this Act the hereditaments comprised in such lease have been surrendered or relinquished or recovered adversely by reason of the invalidity thereof, or there has been any judgment or decree in any action or suit concerning the validity of such lease, and shall not prejudice or affect any action or suit already commenced and now pending in any Court of Law or Equity, but every such action and suit may be proceeded with and such relief had therein as if this Act had not passed.”

13 Vict.
c. 17.

By 13 Vict. c. 17 it is enacted that the 3rd section of the last-mentioned Act be repealed.

“2. Where, upon or before the acceptance of rent under any such invalid lease, as in the (12 & 13 Vict. c. 26) mentioned, any receipt, memorandum, or note in writing confirming such lease is signed by the person accepting such rent, or some other person thereunto by him lawfully authorized, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease.

“3. Where during the continuance of the possession taken under any such invalid lease, as in the Act (12 & 13 Vict. c. 26) mentioned, the person for the time being entitled (subject to such possession as aforesaid) to the hereditaments comprised in such lease, or to the possession or the receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee, his heirs, executors, or administrators (as the case may require), or any person who would have been bound by the lease if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly: and such confirmation may be by memorandum or note in writing, signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorized: and after confirmation and acceptance of confirmation such lease shall be valid, and shall be deemed to have had from the granting thereof the same effect as if the same had been originally valid.”

Where re-
versioner
is willing
to confirm.

16. These enactments do not apply to leases granted by a mere stranger to the leasing power. (*Ex parte Cooper*, 34 L. J. Ch. 372, 377.)

Intention
of these
Acts.

The intention of section 4 of the first Act is to bring leases under powers to some extent within the rule of law that “the interest when it accrues feeds the estoppel.” (*Doe v. Oliver*, 2 Sm. L. C. 671.)

In *Rawlin's Case*, 4 Co. Rep. 52, C. demised land, not his own, to W. for 6 years. R., the true owner of the land, demised it to C. for 21 years; and C. redemised it to R. for 10 years. It was resolved that the lease by C., when he had nothing in the land, was good against him by conclusion, and that when R. demised it to him, then was his interest bound by the conclusion; and that when C. redemised to R., R. was also concluded.

Under the last words of s. 4 it seems that if before

acquiring the power the grantor make a lease at variance with the terms of the power, the lease would, in the event of the grantor acquiring the power, operate as a valid contract for a lease, assuming *bona fides* and entry by the lessee. (Davidson, iii. 422.)

Distinction
between
void and
voidable
leases.

Independently of these statutes, the rule of law is that a *voidable*, but not a *void*, lease may be confirmed by acceptance of rent. A confirmation may make a voidable or defeasible estate good, but it cannot work upon an estate that is void at law. (Co. Litt. 295 b.)

The question whether a lease is void or voidable only turns upon the nature of the lessor's estate.

Mr. Hargrave, in his argument on the Villiers estate case, states that leases for years derived out of an *estate of inheritance* are voidable only; but being derived out of an *estate of freehold* merely are void. It is in consequence of this distinction that leases for years by bishops or tenants in tail are more available than those by parsons or prebends; the two former having an inheritance, the two latter having no more than a freehold. Mr. Justice Doderidge in his commonplace book states two positions, which being literally translated from the law French are in these words: "Acceptance of rent on lease for years which is derived *out of a freehold* will not make the lease good after the death of him on whose life the freehold is. Acceptance of rent reserved on a lease derived *out of inheritance* makes the lease good." (Harg. Jur. Arg. 1, 132.)

But although a void lease by tenant for life is not confirmed by acceptance of rent by the remainderman, yet it will in general be an admission by the remainderman that the lessee is his tenant, so as to create a tenancy from year to year on the terms of the void lease. *Doe v. Watts*, 7 T. R. 83; *Doe v. Weller*, *Ibid.* 478; and see *Bowes v. East London Waterworks Company*, Jac. 324, and *post*, Powers of Leasing.

The combined effect of the rule of law and the statutes above mentioned appears to be as follows :—

Effect of
statutes.

The effect of the original Act *before the repeal of s. 3* is that the lessee under an invalid lease granted in the intended exercise of a power, became, on the mere acceptance of rent by the remainderman, tenant from year to year on the terms of the lease, with a right to require either a confirmation of the contract or a lease in accordance with the power, the remainderman having no option to require a lease in accordance with the terms of the power.

The effect of the original and Amendment Acts is that the mere acceptance of rent, without the memorandum mentioned by section 2 of the Amendment Act, makes the lessee tenant from year to year on the terms of the void lease, with the right to demand a lease either in accordance with that contract or with the terms of the power; but if the remainderman is willing to confirm the contract without variation, the lessee cannot insist on having a lease in accordance with the terms of the power. The acceptance of rent, coupled with the memorandum mentioned in section 2 of the Amended Act, operates as a confirmation of the lease. And see Sug. Pow. 751; Davidson, iii. 420.

17. Sales under ordinary powers of land apart from the timber, or reserving the minerals, are invalid, and cannot be aided in equity.

Sale of
land apart
from
timber.

In *Cockerell v. Cholmeley*, 1 Cl. & F. 60; 1 R. & M. 418, estates were vested in trustees and their heirs to the use of A. for life, without impeachment of waste, with remainders over, and the trustees had a power of sale with the consent of A.: they purported to exercise it by selling the estate apart from the timber, which was valued, and the purchase-money paid to A.: the power was held to be badly executed both at law and in equity.

22 & 23
Vict. c. 35,
s. 13.

To obviate this, it is provided by 22 & 23 Vict. c. 35, s. 13, that where under a power of sale a *bonâ fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life, or any other party to the transaction, shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles, it shall be lawful for the Court of Chancery upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest under the direction of the Court upon such parties as in the opinion of the Court shall be entitled thereto, the said sale ought to be established: and upon such payment and settlement being made accordingly the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him.

It will be observed that this enactment does not authorize contracts like that in *Cockerell v. Cholmeley*: it merely enables the Court to aid the defective execution of the power, if it shall think fit, at the purchaser's expense. The 11th section of 19 & 20 Vict. c. 120, authorizes sales by the Court of land and timber apart, or of mines and lands apart.

Sale of land
apart from
minerals.

18. In *Buckley v. Howell*, 29 B. 546, the Master of the Rolls held that the ordinary power of sale was not well exercised by a sale of the land, reserving the minerals.

To meet this, it is enacted by 25 & 26 Vict. c. 108, that "every trustee or other person now or hereafter to

become authorized to dispose of land by way of sale, exchange, partition, or enfranchisement, may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals, or may (unless forbidden as aforesaid) dispose of by way of sale, exchange, or partition, the minerals with or without such rights or powers, separately from the residue of the land, and in either case without prejudice to any future exercise of the authority with respect to the excepted minerals or (as the case may be) the undisposed-of land. But this enactment shall not enable any such disposition as aforesaid without the previous sanction of the Court of Chancery, to be obtained on petition in a summary way of the trustee or other person authorized as aforesaid, which sanction once obtained shall extend to the enabling from time to time of any disposition within this enactment of any part or parts of the land comprised in the order to be made on such petition without the necessity of any further or other application to the Court.

“Every trustee or other person” includes mortgagees. *Re Beaumont*, 12 Eq. 86; *Re Wilkinson*, 13 Eq. 634. The *cestuis que trust* entitled should be served (*Re Broom*, 11 W. R. 19; *Re Palmer*, 13 Eq. 408); but mortgagees subsequent to the petitioning mortgagee need not. (12 Eq. 86.)

And where trustees have power of sale with consent of the tenant for life, the petition should be served on the tenant for life, and not on the remaindermen. (*Re Pryse*, 10 Eq. 531.) And see *Morgan Ch. Acts and Orders*, 259.

The order has been made generally and without reference to any particular sales. (*Re Williway*, 32 L. J. Ch. 226; *Re Wynne*, 16 Eq. 237.)

CHAPTER VIII.*

EXCLUSIVE APPOINTMENTS.

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Definition.

1. An exclusive power or power of selection, is a power of appointment among a class which authorizes the donee to select one or more of such class to the exclusion of the others. A non-exclusive power, or power of distribution, authorizes the donee to distribute the property among the class in such shares and proportions as he pleases, but not so as to exclude any object entirely. An exclusive power in a marriage settlement of personalty usually takes the form of a declaration, that the trustees shall stand possessed of the fund in trust for all or such one or more exclusively of the others or other of the children of the marriage as the donee of the power shall appoint. In settlements of real estate, the power is created by direct limitation to the use of the child or of all or such one or more, exclusively of the others or other of the children of the marriage, as the donee of the power shall appoint.

What words create exclusive powers.

2. Each case must depend on the intention expressed in the particular instrument creating the power: no general rule can be laid down, except perhaps that the

* See proposed statutory alteration, p. 305.

words "all and every" are mandatory and make it necessary that each object should have a share, (5 Ves. 857) and that "such" authorizes exclusion, unless a contrary intention appear. In the following cases, it was held that the terms of the several powers did not authorize exclusive appointments.

In *Wilson v. Piggott*, 2 Ves. jun. 351, the trust fund was directed to be paid "among all and every the child and children other than an eldest or only son," as the survivor of A. and B. should appoint.

Instances
of non-
exclusive
powers.

In *Bulteel v. Plummer*, 6 Ch. 160, the trust was to transfer 4000*l.* "unto and amongst all and every the son and sons, daughter and daughters of G. T. P. and L. P. and the children of such sons and daughters as should be dead leaving issue," as G. T. P. and L. P. should appoint. And see *Alloway v. Alloway*, 4 Dr. & War. 380.

In *Strutt v. Braithwaite*, 5 De G. & Sm. 369, there was a direction to trustees to employ the rents and profits of real estate "towards the maintenance and education of all and every the child or children" of J. S. and S. S., and on their attaining 21, "to convey the same premises unto such child or children in such manner, shares and proportions and for such uses estate and estates" as J. S. and S. S. should jointly appoint. "Such" was read "the said," and the power was held not to warrant an exclusive appointment.

In *Robinson v. Sykes*, 23 B. 40, the power was to appoint "unto and amongst such child or children of the marriage, or unto and amongst the issue of such child or children in case such child or children should be then dead leaving issue, (which event happened) in such shares and proportions as A. should think fit."

In *Re David*, Joh. 495, the words were "to and among such of the testator's children as should be living at A's death, in such shares as A. should appoint. And see

Burleigh v. Pearson, 1 Ves. sen. 280; and *Ward v. Tyrrell*, 25 B. 263, 27 L. J. Ch. 749.

Contrary
intention.

Although the words of the power may not, taken alone, authorize an exclusive appointment, yet the intention that exclusion should be authorized may be collected from the whole scope of the instrument.

In *Burrell v. Burrell*, Ambl. 660, 5 Ves. 860, the testator gave all his real and personal estate to his wife, to the end that she might give his children such fortunes as she should think proper, or they best deserve; to whom he charged his sons and daughters to be dutiful and obedient, and loving and affectionate to each other. The wife appointed to all the children, but gave one an illusory share. Lord Camden was of opinion that these words were so ample, that if she thought fit to give nothing to one, she might so execute her power. Lord Alvanley says of this (5 Ves. 860) "I will not say what my own opinion would have been. I am willing to subscribe to that of Lord Camden on such a doubtful question, being perfectly satisfied that in setting aside these appointments, criticising upon the words 'to and amongst &c.,' and the rule as to illusory shares, the Court goes against the intention. I must therefore think that under the words of that will Lord Camden thought the wife might have given the whole to one child, and had a right to exclude any who in her opinion did not want it." In *Mahon v. Savage*, 1 S. & L. 111, a testator bequeathed a legacy to his executors to be distributed among his poor relations or such other objects of charity as should be mentioned in his private instructions. No directions were left, and Lord Redesdale was of opinion that the executors had a discretionary power and need not include all the testator's poor relations.

Instances
of exclusive
powers.

In *Kemp v. Kemp*, 5 Ves. 857, the Master of the Rolls mentions certain cases in which exclusive appointments have

been authorized. In *Swift v. Gregson*, 1 T. R. 432, the words were "to and for the use and behoof of such child or children of J. G." as he should appoint. In *Spring v. Biles*, 1 T. R. 345, n., "to and amongst such of my relations as shall be living at the time of my decease in such parts, shares and proportions," as A. should think proper. In *Thomas v. Thomas*, 2 Vern. 573, "to one or more of his children." *Tomlinson v. Dighton*, 1 P. W. 149, "to any of his children." *Macey v. Shurmer*, 1 Atk. 389, "amongst all or such of his children." *Liefe v. Saltingstone*, 1 Mod. 189, "to such of my children." All these words were held to show a manifest intention to give a power to appoint to any one child. And see *Turner v. Bryans*, 81 B. 303. And it seems that a power to appoint "to one of the sons of A. as B. should direct," would not merely authorize, but compel an exclusive appointment to one only: *per* Lord Alvanley in *Brown v. Higgs*, 4 Ves. 717.

3. It is a rule that an appointment under a non-exclusive power, which exhausts the property subject to the power without giving a share to all the objects, fails entirely.

The same rule applies if several appointments, to take effect together, are made by one and the same instrument to different persons, by which the whole fund is exhausted without a share being given to each of the objects.

When exclusive appointments fail *in toto*, and when in part.

In *Bulsteel v. Plummer*, 6 Ch. 160, a testatrix, having power to appoint a fund by will amongst all and every of her children and their children, covenanted to appoint 2,500*l.* to one child. By her will she accordingly appointed 2,500*l.* to that child, and appointed other parts of the fund to other objects of the power, and bequeathed and appointed all the estate over which she had a dis-

posing power to another object: these appointments exhausted the fund without providing a share for all the objects. It was held that all the appointments failed.

Lord Hatherley said, "This is an instrument which at once takes effect as to all the objects; the whole fund is given to the several objects mentioned, one of whom is the last. It appears to me that it would be impossible for us, on any collocation of the persons, to say that because she has last named one particular person, therefore all the other appointments are good; and this one being void, the rest are to stand."

But the rule does not apply to appointments of portions of property made at different times. If an appointment of part has been made, which is perfectly good, and there is left residue enough to give something to all the other objects of the power, then a gift made by deed to others may be perfectly good and the appointor may go on until he comes to the last, which may be bad. The others are perfectly good, and are not made bad because there is a bad disposition of the rest of the fund. (*Ibid.*)

By setting aside the last appointment, which in the case supposed, is an independent one, part of the fund is left free to go as in default of appointment, and therefore none of the objects are excluded. And see *Young v. Lord Waterpark*, 13 Sim. 199; *Wilson v. Piggott*, 2 Ves. jun. 351.

Appoint-
ments bad
in their in-
ception
made good
by event.

It is well established that appointments, in execution of non-exclusive powers, which exhaust the whole fund without giving a share to all the objects, may be rendered valid by subsequent events; if part of the fund purported to be appointed fails, there is an end to the question of exclusive appointment.

In *Ranking v. Barnes*, 33 L. J. Ch. 539, the donee of a non-exclusive power appointed by deed in 1830 two-sixths of the trust fund to one of the objects; and in 1843, by

two deeds poll, she appointed the residue to two others of the objects, assuming that the appointment of 1830 was valid. These three appointments exhausted the fund without including all the objects of the power. The appointment of 1830 was subsequently set aside as to one moiety thereof as being a fraud on the power. It was held that the partial failure of the appointment of 1830, by setting free a portion of the fund and leaving it to devolve as unappointed, removed all objection to the subsequent appointments on the ground of exclusiveness.

It would be the same if the appointments were by one and the same instrument, *e. g.* by will. In *Bulfeel v. Plummer*, (stated above) Lord Hatherley doubted whether it was not possible to say that the appointment of 2,500*l.* was fraudulent and void, "the effect of which would be to make the other gifts good." And in the Court below, (8 Eq. 585), V.-C. Malins held that the appointment of the residue was invalid, and that consequently the other appointments were good.

It is not necessary, in order to establish an appointment of part of the property to one object under a non-exclusive power, that the appointor should appoint the residue to the other objects; it will be sufficient, if he leave it to devolve under the gift in default of appointment.

And although the power be non-exclusive, an appointee of part of a fund will be entitled to a share of any unappointed part in the absence of special directions as to hotchpot. The burden of proving that the gift over to all equally in default of appointment is not to take effect, lies on the party asserting it; it is not enough to show that, at the time of the execution of the deed, it was the intention of the donee that the appointee should have no more than the part appointed. It is necessary to go beyond that and show, by express words or by necessary implication, that

the other objects should take something under the deed. *Wombwell v. Hanrott*, 14 B. 143; *Wilson v. Piggott*, 2 Ves. jun. 357; *Alloway v. Alloway*, 4 Dru. & War. 380.

What is an
exclusive
appoint-
ment.

4. It is usually clear whether an appointor has or has not entirely excluded any one object of the power; but the question may arise whether there has been any intention to appoint to all the objects or not; this will depend on the rules already stated with regard to the execution of powers (*ante*, p. 146, *et seq.*); but two cases of a somewhat peculiar character may be here noticed.

In *White v. Wilson*, 1 Drew. 298, a married woman appointed the residue of a fund, over which she had a general power, to her children, A., B., and C., in such manner as D. should by will appoint. D. by his will in exercise of the power appointed 500*l.* to A. () to B., "he having been already more than sufficiently provided for," and the residue to C. This appointment was held bad. V.-C. Kindersley thought it by no means clear that D. did not intend to appoint something to B., but as nothing had been actually given, he could not hold that a power to appoint to three authorized an appointment to two.

In *Gainsford v. Dunn*, 17 Eq. 405, a testatrix, a spinster, having power to appoint certain funds by will in favour of A., B., C., D., and E., in such parts shares and proportions as she might think fit, and having no other power, by her will gave legacies of 5*l.* each to A., B., and C., and all the residue of her property, of whatever kind and wheresoever situate, and over which she had any power of appointment to D. and E. The testatrix had some personal estate of her own. The Master of the Rolls said, that where you find a legacy followed by a gift of the residue of real and personal estate, the word residue is considered to mean that out of which something given before has been taken, and the result is to make the residue a mixed fund and to charge the

legacies proportionally and rateably upon the mixed fund. He considered that doctrine was applicable to appointments under powers, and that the legacies of 5*l.* were consequently payable partly out of the testatrix's own property and partly out of the fund appointed; and he accordingly held the power well exercised. It seems difficult to reconcile this decision with the authorities: the only intention to execute the power has to be extracted from the word residue; but that word fairly applies only to the testatrix's own property, part of which she had given away in the previous part of her will, and not to the property subject to the power, no part of which she had therein appointed. Moreover, the decision goes too far; if the fund appointed becomes part of and blended with the residuary estate, it is subject primarily to her debts; but this would show that she did not intend to exercise the power at all, for she had no power to make it liable to her debts. The decision in *Clogstown v. Walcott*, 13 Sim. 523, to this effect has been dissented from on the ground that the rule *reddendo singula singulis* applies, and that the testatrix meant her debts to come out of that property which was absolutely her own (see *ante*, p. 155). But it is difficult to see how this can be applied in part and excluded in part; it seems contradictory to hold that the appointment is good, because the residue is a mixed fund and the legacies are therefore charged on the whole rateably, and at the same time to hold that the appointment is good, because the residue is not an absolutely blended fund, but the debts, by the rule *reddendo singula singulis*, are to be charged on that part of the residue only which is properly applicable to them; if the debts, why not the legacies? What evidence of intention is there that these, any more than the debts, should come out of the appointed fund?

Illusory
appoint-
ments,

5. Under the old law, before the statutory alteration next mentioned, when a power was given to appoint among a class in such parts or shares as the appointor should direct, it was held that the meaning of the person creating the power was, that the appointor should appoint a substantial share to each object of the power. This was not according to the literal wording of the power, but it made sense of it; because, if the appointment of a farthing would do, then, on the principle *de minimis non curat lex*, it would make every non-exclusive an exclusive power. This doctrine, however, was found inconvenient. No one knew exactly how much a substantial portion of the property was, and it was impossible to say without resorting to litigation, what the least sum was which the appointor was authorized to appoint. This inconvenience led to an alteration of the law, under the guidance of Lord St. Leonards, and it was enacted that in future no appointment might be objected to on the ground of its being illusory, that is, on the ground of the smallness of the sum or share appointed, but the construction of the power was not altered. The consequence of this alteration has been this, that where the power is non-exclusive, if the appointor forgets to appoint a shilling or even a farthing to every object of the power, the appointment is bad, because someone is left out. But if some share, however small, be appointed or left unappointed to devolve upon all the objects, the appointment will be valid. (17 Eq. 406.)

11 Geo. 4
& 1 Will. 4,
c. 46.

6. The statute above referred to enacted as follows :—
(i.) No appointment which from and after the passing of the Act (16th July, 1830,) shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity on the ground that an unsubstantial,

illusory, or nominal share only shall be thereby appointed to, or left unappointed to devolve upon, any one or more of the objects of such power; but every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power. (ii.) Provided that nothing in the Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any such power as aforesaid, which shall declare the amount of the share or shares from which no object of the power shall be excluded. (iii.) Provided also that nothing in the Act contained shall be construed, deemed, or taken at law or in equity, to give any other validity, force, or effect, to any appointment than such appointment would have had, if a substantial share of the property affected by the power had been thereby appointed to, or left unappointed to devolve upon, any object of such power.

The statute operates retrospectively on powers existing at the time of, but executed after, the passing of the Act. *Reid v. Reid*, 26 B. 469, 480. Retro-spective.

7. The statute requires a share, however small, to be given to or left undisposed of to devolve upon all the objects of the power. (*Bulteel v. Plummer*, 6 Ch. 162.) It has been considered that an appointment under a non-exclusive power of the whole property to some of the objects, with a gift over, in case any of them should die under age, or before marriage under age, of their shares to the other objects, was not valid under the act. (*Minchin v. Minchin*, 3 Ir. Ch. Rep. 167.) But Lord St. Leonards says of this (Pow. 450), that it was not necessary to decide this point and it seems to require further consideration. Appointment of contingent or reversionary interest.

The intention of the legislature in enacting that no share should be deemed illusory, but leaving it still obligatory on the appointor to give something to each object, seems to have been to make it certain in each case that the omission of any object was not an oversight. The most trifling amount is sufficient to satisfy the statute. Thus, in *re Stone*, Ir. R. 3 Eq. 621, the donee of a non-exclusive power appointed to one object all the lands and premises subject to the power, except the square yard of land therein mentioned, and appointed to the other object one square yard of the said lands in such part thereof as the first appointee should think fit. This was held good, the Court being of opinion that the legislature had authorized an appointment which is "illusory, unsubstantial, and nominal: in fact, a mere cipher." It would seem, therefore, that the appointment of a mere reversionary or contingent interest would be sufficient; all that is necessary is that something should be given.

The law
before the
statute.

8. Before the statute the donee of the power could not give a mere reversionary interest to any child; but he might give to one child a share for his own life, or for the life of another person, with remainder over to the other children, and he might cross the gifts from one to another, provided only that he gave to each a real substantial share in possession and not a mere nominal or reversionary interest (per Lord St. Leonards, *Alloway v. Alloway*, 10 Dr. & War. 387).

In *Lloyd v. Laver*, 14 Sim. 645, where the appointment was before the act, the Vice-Chancellor held that if a fund is given in trust for all and every the child and children of A., who shall be living at the time of her decease, in such parts or shares and in such manner as A. shall appoint, an appointment of successive life interests in the whole income of the fund, is not an

appointment to all the objects in shares. He apprehended that no appointment could be a good execution of such a power, unless it gave a share of the capital to each of the objects. For the law on illusory appointments before the statute see Sug. Pow. 938.

Since this chapter was in type, Lord Selborne has brought in a bill in the House of Lords, the effect of which, if it become law, will be to put exclusive and non-exclusive powers on the same footing, and to prevent any appointment from failing by reason that the appointor has exhausted the fund without having given some share to all the objects.

Proposed
statutory
alteration.

CHAPTER IX.

ELECTION.

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Principle of election.

1. The principle of election is that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions and renouncing every right inconsistent with them. *Streatfield v. Streatfield*, 1 W. & T., L. C. 303.

Applies to all instruments.

The doctrine is applicable to all instruments, deeds as well as wills. "The general rule is, that a person cannot accept and reject the same instrument, and this is the foundation of the law of election, on which Courts of Equity particularly have grounded a variety of decisions in cases both of deeds and of wills, though principally in cases of wills, because deeds, being generally matters of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires." Per Lord Redesdale, *Birmingham v. Kirwan*, 2 S. & L. 444, 449. In *Codrington v. Lindsay*, 8 Ch. 578, Lord Selborne cites this rule with approbation, and

says, that it is illustrated as to cases of voluntary deeds by *Llewellyn v. Mackworth*, Bar. 445, and *Anderson v. Abbott*, 23 B. 457; as to cases of contract for valuable consideration resting in articles by *Savill v. Savill*, 2 Coll. 721, and *Brown v. Brown*, 2 Eq. 481; and as to contracts for value completely executed by conveyance and assignment, by *Bigland v. Huddleston*, 3 Bro. C. C. 285 n.; *Chetwynd v. Fleetwood*, 1 Bro. P. C. 300, 4 Bro. P. C. 435; *Green v. Green*, 2 Mer. 86; *Bacon v. Cosby*, 4 De G. & Sm. 261; *Mosley v. Ward*, 29 B. 407; and *Willoughby v. Middleton*, 2 J. & H. 344. He also suggests (p. 586) that the principle of election, as applied to deeds, is that a person claiming under a deed shall not interfere by title paramount to prevent another part of the deed from having effect according to its construction. And see *Sadleir v. Butler*, Ir. R. 1 Eq. 415. But cases of express condition must be distinguished: such are not cases of election at all. (Sug. Pow. 577, and see 2 Ves. jun. 371.)

2. The doctrine of election applies to appointments under powers; it may be stated as a general rule that

Election
applies to
appoint-
ments
under
powers.

Where there is a direct appointment to strangers to the power, and a gift by the same instrument to the persons entitled in default of appointment, the latter will be put to their election. *Whistler v. Webster*, 2 Ves. jun. 367.

In order to raise a case of election there must be an absolute direct appointment to the strangers; nothing short of that will be effectual; a mere condition annexed to an appointment to an object would be treated as an unwarranted attempt to restrict the interests of the real objects of the power, and would be rejected accordingly.

The cases of *Carver v. Bowles*, 2 R. & M. 301, and *Blacket v. Lamb*, 14 B. 482, illustrate this and show that the first question is, are the words of appointment sufficient to vest the property absolutely in the objects of the power, with a superadded condition not warranted by the power, or do the superadded words in terms constitute an absolute unconditional appointment in favour of the strangers? See *post*, s. 4.

Appointment to strangers and gift to persons entitled in default.

Where a man having a power to appoint to A. a fund, which in default of appointment is given to B., exercises the power in favour of C. and gives other benefits to B., although the execution is merely void, yet if B. will accept the gifts to him, he must convey the estate to C. according to the appointment. (Sug. Pow. 578.)

Revocation of absolute appointment, and gift to appointee.

If the donee of a power appoints in due form, without reserving any power of revocation, to A. an object of the power, and afterwards purports to revoke that appointment, or if he has reserved a power of revocation, but the original power has been by some means extinguished, and he purports nevertheless to exercise it—in either case, if by the same instrument he gives benefits to the original appointee, the latter will be put to his election. In *Cooper v. Cooper*, 6 Ch. 15, Mrs. C. had a power of appointment among her children to be exercised before a certain period. Before that period she made a valid appointment and reserved a power of revocation. By her will, which did not come into operation until after the period during which her power existed, and was therefore an invalid execution of it, she purported to make a different disposition of the property subject to the power, and at the same time gave benefits to the original appointees. It was held that the latter were put to their election, and that the next of kin of one of them, who was dead, were also bound to elect. And this was affirmed in the House of Lords, W. N. 1874. 109.

If the donee of a non-exclusive power of appointment among a class (to whom the property is limited in default of appointment) appoints exclusively to one object, and by the same instrument confers benefits on the others, the latter will be put to their election. (Sug. Pow. 579.)

Exclusive appointment under non-exclusive power.

If the donee of a power improperly delegates it to another, and confers gifts by the same instrument on the persons entitled in default of appointment, they will be put to their election. *Ingram v. Ingram*, cited 1 Ves. sen. 259.

Delegation.

The doctrine applies equally to the converse case of a revocation in excess of the power. In *Coutts v. Acworth*, 9 Eq. 519, a fund was vested in trustees in trust for A. for life with remainders over, and there was reserved to the settlor a power of revoking the remainders over. The settlor by his will purported wholly to revoke the trusts of the settlement and gave benefits to A. It was held that A. was put to his election.

Revocation in excess of power reserved and gifts to appointee.

3. But if the donee of the power appoint the specific property subject to the power to strangers, and then appoint, devise, and bequeath all his property not thereinbefore specifically and absolutely appointed or bequeathed, to an object of the power, the latter will take the property subject to the power under the residuary appointment, and no case of election will be raised, although the residuary gift comprised property belonging to the testator absolutely. The rule is that—

Limits of doctrine.

The doctrine of election is to be applied as between a gift under one instrument and a claim dehors that instrument and adverse to it, and is not to be applied as between one clause in an instrument and another clause in the same instrument.

In *Wollaston v. King*, 8 Eq. 165, A. had power under

her marriage settlement to appoint certain funds among the children of the marriage. A. by her will in execution of this power appointed a portion of the funds to child B. for life, with remainder (which was void, see *ante*, p. 228) as he should by will appoint, and made a general residuary appointment of the settled fund, subject to all other appointments made thereof, to her daughters, to whom she gave benefits out of her own property by the same will. It was held that the daughters were not put to their election.

“It would seem a very strange thing that in construing the same instrument the Court, dealing with a clause in which a fund is expressed to be given partly to A. and partly to B., should hold that the gift to A. being void, the testator’s intention is that B. should take the whole; and then, coming to another clause in which another fund is given to B. and no mention of A. at all, it should hold that there is an implied condition that B. should give back part of that which it was the testator’s intention that he should take.” Per V.-C. James, 8 Eq. 174, and see *Wallinger v. Wallinger*, 9 Eq. 301; and cf. *Warren v. Rudall*, 1 J. & H. 1.

Election
between
successive
appoint-
ments.

But there may be election between successive appointments in the same instrument. Where successive irrevocable appointments are made in favour of the same person, the latter appointment will be held to be in substitution for the former, if such appears to be the intention of the appointor, and the person in whose favour the appointments are made will be compelled to elect between them. In *England v. Lavers*, 3 Eq. 63, A. having a power of appointment among children over a fund, appointed one-seventh to a child E. on her marriage, and another one-seventh to child L. on her marriage; he afterwards executed a deed-poll, by which, without noticing the previous appointments, he gave one-

sixth to E., another one-sixth to L., three-sixths to other children, and left one-sixth undisposed of. By his will he disposed of so much of the fund as was not then already appointed in favour of any of his children. The Master of the Rolls held that the deed-poll was in substitution for the former appointments. Of course the donee of the power could not interfere with these appointments, but when he executed the deed-poll, he meant to give each of his daughters one-sixth not in addition to, but in substitution for, the one-seventh he had already given; a case of election was accordingly raised. This is, however, rather a question of construction than of election, properly so called.

And all questions of election must depend on the state of circumstances existing at the testator's death. *Lady Cavan v. Pulteney*, 2 Ves. jun. 544, 3 Ves. 384. In *Grissell v. Swinhoe*, 7 Eq. 291, a testator who was entitled to a moiety of a fund, purported to bequeath the whole and to give one moiety thereof to the husband of the lady who was really entitled to one moiety in her own right. She survived the testator, and it was held that the husband, who had become entitled as his wife's administrator to her moiety, was not bound to elect between that and the gift in the testator's will. This decision proceeded on the assumption that the legatee's title to the property did not exist at the death of the testator, but was a derivative title through the title of another person who was the true owner at the death. (*Cooper v. Cooper*, 6 Ch. 15, 21.)

4. There remains to be noticed an important exception to the application of the doctrine of election to appointments under powers, which is thus stated by V.-C. Wood:

No election between gifts under a will and property subsequently taken under a derivative title.

No election if there be a valid appointment with improper conditions added.

Where there is an absolute appointment to an object of the power, followed by attempts to modify the interest so appointed in a manner which the law will not allow, the Court reads the will as if all the passages in which such attempts are made, were swept out of it for all intents and purposes.

That is, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election. *Woolridge v. Woolridge*, John. 68; *Carver v. Bowles*, 2 R. & M. 304. And, *a fortiori*, if the attempt to modify the appointee's interest be merely precatory, no case for election will arise. *Blacket v. Lamb*, 14 B. 482; *Langslow v. Langslow*, 21 B. 552; *Moriarty v. Martin*, 3 Ir. Ch. R. 26, although mentioned with some approval by Lord St. Leonards (Pow. 582) cannot be taken to be now law (5 Eq. 49).

And the Court will regard with particular disfavour any modifications or conditions attached to an appointment which failed by transgressing the rules against perpetuity, or the like. It is not for the Court to aid attempts of that nature either by the application of the doctrine of election or otherwise. (*Wollaston v. King*, 8 Eq. 175.) And see *ante*, p. 226, "Excessive Execution."

The disappointed donee is entitled to compensation not forfeiture.

5. Notwithstanding the opinion of Lord St. Leonards to the contrary (Sug. Pow. 576), it is clear that compensation, not forfeiture, is the right of the disappointed donee. See 1 Sw. 433, n., where, after a review of the authorities, the following conclusions are arrived at:—
(i.) That in the event of election to take against the

instrument, courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints. (ii.) That the overplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right. And see *Schroder v. Schroder*, Kay, 582; *Douglas v. Douglas*, 12 Eq. 617.

Inasmuch as the doctrine of election depends on compensation, it follows that the donee of a limited power, who appoints to strangers, must confer benefits on the persons entitled in default of appointment out of property absolutely his own. "The doctrine of election cannot apply where there is no other subject but that to be appointed. It never can be applied but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate for what is taken away; therefore in all cases there must be some free disposable property given to the person which can be made a compensation for what the testator takes away." *Bristow v. Ward*, 2 Ves. jun. 336, 350.

Testator must give property of his own, out of which compensation may be made.

In *re Fowler*, 27 B. 362, a testator had two distinct exclusive powers, one over real estate the objects of which were his children and grandchildren, the other over personalty the objects of which were his children only. He appointed the realty among some of his children, and the personalty among some of the children and a grandchild: it was held that no case of election was raised in favour of the grandchild.

No election between two appointments under limited powers.

In *re Aplin*, 13 W. R. 1062, a testator had also two distinct powers over two distinct funds; the objects of both powers were his children, and the fund was given to them in default of appointment; but only one of the powers authorized an exclusive appointment. The tes-

tator had five children and he exercised both powers by his will, appointing under the exclusive power to child A., and under the non-exclusive power to children B. and C. The latter appointment was invalid, and A. was entitled to a share of the fund as in default of appointment. It was held that no case of election was raised against him.

The doctrine applies to property of all sorts.

6. Property of all sorts, freehold and copyhold, real and personal, is subject to the doctrine of election, and that, whether the interests are immediate, remote, contingent, of value or not of value. *Wilson v. Townsend*, 2 Ves. jun. 693.

And to all persons.

The doctrine also applies to the interests of persons under disability, as infants and married women. (Sug. Pow. 577.) In cases of infancy the period of election is either deferred until the infant attains twenty-one (*Streatfield v. Streatfield*, 1 W. & T., L. C. 308); or an inquiry is directed as to what would be for the infant's benefit. *Gretton v. Haward*, 1 Sw. 413, n. (c). And an order has been made in some instances for an infant to elect without any reference to chambers. *Lamb v. Lamb*, 5 W. R. 772; *Rushout v. Rushout*, 6 Bro. P. C. 89; *Blunt v. Lack*, 26 L. J. Ch. 148. As a general rule in cases of disability by reason of coverture, an inquiry will be directed as to what is for the benefit of the married woman. 1 Sw. 413, n. (c).

Effect of election.

7. If the person who elects be absolutely entitled, his election of course binds all who claim under him; but if he has only a limited interest, his election will not bind the rights of those entitled in remainder (*Ward v. Baugh*, 4 Ves. 623), and each of such remainder-men has a separate right of election, although Lord Northington was of opinion that the rule of election was to be confined to a plain and simple devise of the inheritance, and could not be extended to limitations. (*Forrester v. Cotton*, Ambl.

Election by tenant for life.

388.) This view, however, is not sanctioned by subsequent authorities. (1 Sw. 408, n. ; Sug. Pow. 578.)

In *Fytche v. Fytche*, 7 Eq. 494, a testator made several bequests to his wife, including some property to which she was entitled in her own right. The wife survived and received the benefits given by the will, but never elected, and died intestate leaving four next of kin, three of whom elected to take under the will, and the fourth, who was the widow's heir and administrator, against it. It was held that each of the next of kin had a separate right of election, and that neither the election of the majority, nor that of the heir and administrator bound the others.

Election by a married woman binds both her real and personal estate in the hands of her heirs and representatives (*Ardesoife v. Bennet*, 2 Dick. 463), and she may elect without deed acknowledged. (*Barrow v. Barrow*, 4 K. & J. 409.) Her husband also is bound by her election in respect of personalty and realty held in trust for her ; but he is not bound in respect of her legal estates in realty, or in respect of her personalty which vests in him in her right, for the right of election is an equitable doctrine and does not bind legal estates. It has been said (2 Ves. jun. 560) that "the election is hers and her husband's ; a married woman may forfeit a conditional gift ; the estate is in her ; he takes in her right. If they disagree, it must be considered by the Court what is most for her interest ; if he is considered as having an estate, that must rise and fall with hers ; it is the most favourable supposition for him." Per C. J. De Grey. However, in *Brodie v. Barry*, 2 V. & B. 127, the heiress-at-law of heritable property in Scotland was also legatee of personal property in England. Her ancestor devised his real estates in Scotland away from her ; it was held that, although she was put to her election, the interest of her husband in his marital right could not be affected. This

Election by
married
woman.

was admitted by Sir S. Romilly, who was counsel for the plaintiff.

In *Griggs v. Gibson*, 1 Eq. 685, by the antenuptial settlement of A. certain real estate was limited (after the death of A. and his wife) to the use of all the children of the marriage as tenants in common in tail; and by the same settlement, personal property was vested in trustees on trust for the same persons. A. by his will gave 1000*l.* per annum to B., one of his daughters, for her separate use for life, and declared that she should accept it in full for any share or interest that she might take under his marriage settlement. B. was a married woman and her husband was insolvent; she elected with her husband's concurrence to take under the will and renounce all benefits under the settlement. It was held that, inasmuch as the personal estate was standing in the name of the trustees and the fund was not in the wife's possession or in her husband's in her right, the interest of the husband and his official assignee failed entirely; for the wife's interest called on her to claim the property. But it was also held that her election could not defeat the interest of the official assignee in the real estate, but she was bound to give compensation, in electing against the settlement, to the extent of the realty which the assignee could have taken.

What is
necessary
to raise a
case of
election.

8. In order to raise a case of election, the testator must purport to dispose of property not his own. (*Forrester v. Cotton*, 1 Eden, 532.) This requirement would be fulfilled by the donee of a limited power by an appointment to a stranger. It makes no difference whether he knew the property to be another's or supposed it to be his own, so long as the intention to dispose of the property is clear. (*Whistler v. Webster*, 2 Ves. jun. 367, 370.) On the same principle it is immaterial whether the donee of a limited power expressly appoint to strangers

with the full knowledge that his power is limited, or whether he erroneously suppose that his power is a general one, or comprises the persons to whom he appoints,

It is a rule in the construction of wills that a general devise or bequest does not include property which did not belong to the testator, in order to raise a case of election (1 W. & T., L. C. 315, and cases there cited; *Synge v. Synge*, 9 Ch. 128). It follows therefore that although a general devise or bequest since the Wills Act executes general powers, such a devise or bequest would not be taken to operate as an execution of a limited power in order to raise a case of election. And parol evidence is not admissible to show that the testator was under a mistaken apprehension that certain property belonged to him, or that his power was general, and intended to include such property, or the property subject to such power, in his residuary gift (*ibid.* Sug. Pow. 597). It is perhaps doubtful whether general words of gift and appointment would be held to execute a limited power in favour of a stranger in order to raise a case of election, if the testator had no other power. A limited power may be sufficiently referred to by general words of appointment, if the donee has no other power and the appointee is an object of the power (*re Teape*, 16 Eq. 442 and *ante*, p. 150); but a mere reference to all powers in general terms seems too slight evidence of intention, if the appointee be a stranger.

9. The difficulty of sustaining a case of election is always much greater where the testator has a partial interest in the property dealt with, than where he purports to devise an estate in which he has no interest at all. Where the testator has some interest, the Court will lean as far as possible to a construction which would make him deal only with that to which he was entitled. *Howells v. Jenkins*, 2 J. & H. 706, 713; *Wintour v. Clifton*, 8 D. M. & G. 649; *Grissell v. Swinhoe*, 7 Eq. 291.

Where
testator has
partial
interest.

In *Henry v. Henry*, Ir. R. 6 Eq. 286, an estate called Dolphin's Barn was settled on trust for A.'s wife for life for her separate use, with remainder for the children of the marriage as the wife should appoint, and in default of appointment, for the children equally. By the death of one of his seven children, A. became entitled to one-seventh of the premises. By his will he gave "his property in Dolphin's Barn." This was held to mean merely his one-seventh, and not to show an intention to dispose of property not his own so as to raise a case of election. And see *Padbury v. Clarke*, 2 Mac. & G. 298; *Fitzsimons v. Fitzsimons*, 28 B. 417. But in *Wilkinson v. Dent*, 6 Ch. 339, where a testatrix was in possession of the entirety of an estate A., but was owner of only one moiety, and was mortgagee in possession of the other, a gift of "all and singular the mines of A, formerly the estate of S," was held to operate on the whole estate, and not merely on her own moiety; for wills are to be construed reasonably, although parties are thereby put to their election.

10. No person can be made to elect without clear knowledge of the state of the properties (*Whistler v. Webster*, 2 Ves. jun. 371), and if election be made in ignorance it will not be binding. (*Pusey v. Desbouverie*, 3 P. W. 315.) But election need not be express; it may be implied: but the acts from which the election is to be implied must be done with a full knowledge of the elector's rights, and with the intention of electing. *Stratford v. Powell*, 1 B. & B. 1. The rule is thus stated by Lord Chelmsford.

Requisites
to make a
binding
election.

In order that a person who is put to his election should be concluded by it, two things are necessary. First, a full knowledge of the nature of the inconsistent rights and of the necessity of electing between them. Second,

an intention to elect manifested, either expressly or by acts which imply choice and acquiescence. *Spread v. Morgan*, 11 H. L. C 615.

The doctrine of election is a rule not of law but of equity; the knowledge of it is therefore not to be imputed as a matter of legal obligation. (*Ibid.*)

The person to elect is entitled to full particulars of the estates between which his choice is to be made, and the Court of Chancery will in almost all, if not in all, cases entertain a suit by a person put to election to ascertain the value of such estates. (*Butricke v. Broadhurst*, 1 Ves. 172.) “There is in almost all cases jurisdiction in equity to compel a final election, so as to quiet the title of those interested in the objects of which one is to be chosen; and the Court, as a condition of compelling such final election, secures to the person compelled to make it all the information necessary to guide him in doing so. It is also generally, though perhaps not universally, true that a person for whose benefit conditions will be imposed by the Court before it makes an order against him, can entitle himself to the benefit of the conditions by filing a bill and offering by it to submit to the order.” Per V.-C. Wickens, *Douglas v. Douglas*, 12 Eq. 617, 637.

Knowledge
of proper-
ties.

But although, before an heir can be put to his election, he is entitled to know everything which concerns the situation and value of the property in reference to which he may be required to make the election, it is not necessary, when an heir has deliberately confirmed a devise of lands, which without his confirmation would be invalid, to adduce distinct evidence of his knowledge of his rights, in order to bind his representatives. *Dewar v. Maitland*, 2 Eq. 834.

Evidence of
knowledge.

Election
may be
implied.

Election may be implied from the state of circumstances.

“From a long course of dealing, from a series of acts, the Court is at liberty, as an inference of fact, to conclude that the party called upon to elect knew his rights, knew the value of both estates, and knew the rule of equity that he was bound to elect, and had, with that full knowledge, made his choice, with the intention of making it and of electing between the two estates. To justify the Court, however, in arriving at that conclusion, there must be a series of acts or dealings, consistent only with the knowledge which I have already mentioned, and with the deliberate intention to elect, or at least a series of acts or dealings that preponderates so strongly in the mind of the Court, that no person could come reasonably to any other conclusion; and the onus of proof must rest always upon the party who alleges that the knowledge existed, and that the deliberate choice was made.” *Sweetman v. Sweetman*, Ir. R. 2 Eq. 141, 153.—*Per V.-C. Chatterton*.

It is impossible to lay down any exact rule as to the acts from which election will be presumed. If a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt affording no proof of preference cannot be an election to take one and reject the other. (*Padbury v. Clark*, 2 Mac. & G. 298.)

Mere lapse
of time not
enough.

No line can be drawn from mere length of time; but it must be from circumstances showing the intent of the party; receipt of rents or of personalty officially will not bind. *Butricke v. Broadhurst*, 3 Bro. C. C. 88; *Sopwith v. Maugham*, 30 B. 235.

In *Edwards v. Morgan*, 13 Price, 782, it was held that it must be shown in order to make mere acquiescence binding, that injury would now arise to third persons from rescinding it, and that it would be impossible to place them except in a worse condition than they would have

been in if the party had elected earlier : and secondly, that the elector knew that he had a right to elect ; that is, that he knew not only the existence of the instrument, but the consequences of it on his rights. In *Brice v. Brice*, 2 Moll. 21, the Lord Chancellor said : “ There is no time limiting the right to elect, for all the circumstances of the case are to be taken together, and if they do not bring the case within Sir W. Grant’s distinctions, (in *Edwards v. Morgan*,) the right of election continues, notwithstanding almost any given lapse of time.” And see *Dillon v. Parker*, 1 Cl. & Fin. 303 ; *Worthington v. Wiginton*, 20 B. 67 ; *Briscoe v. Briscoe*, 1 J. & L. 334.

If the question arises between the heir and the personal representatives of the person entitled to elect, it seems that the Court will not presume an election against the will unless it be manifestly to the donee’s advantage. In *Harris v. Watkins*, 2 K. & J. 473, a testator devised his residuary real estate in lieu and discharge of all debts due to the devisee. The devisee died intestate three days after the testator. It was held that, as it was not manifestly for the disadvantage of the devisee to retain the devised estate, the Court could not presume a disclaimer, and that, consequently, the heir was entitled to the estate, and the debts due to the devisee and claimed by the administrator were discharged.

Presump-
tion of
election.

11. It may here be added, that an heir under the old law was put to his election, where an estate was devised to him, although by the rule of law the devise was inoperative, and he took by descent (Sug. Pow. 577) ; but now, by 3 & 4 Will. 4, c. 106, s. 3, the heir takes as devisee.

Election by
heir.

But an English heir is not to be put to his election by an unattested will or codicil ; nor by a will which is void by reason of the testator’s incapacity, or which was not

properly executed to pass real estate. *Gardiner v. Fell*, 1 J. & W. 22; *Ex parte Lord Ilchester*, 7 Ves. 372; *Hearle v. Greenbank*, 3 Atk. 715; unless the gift to him be by way of express condition. *Boughton v. Boughton*, 2 Ves. sen. 12.

But this doctrine does not apply to customary or copyhold heirs; nor to Scotch or colonial heirs. *Dewar v. Maitland*, 2 Eq. 834; *Brodie v. Barry*, 2 V. & B. 127; *Orrell v. Orrell*, 6 Ch. 302.

In the above-mentioned cases the English heir was not put to his election because there was a disability in the person of the testator (2 Ves. sen. 14); his will purporting to dispose of the property could not be read at all.

So, an appointment by will made during coverture by a married woman, in execution of a power to appoint "in case she should die in her husband's lifetime," will be absolutely void, if she survive him and die without republishing her will; and no case of election will be raised (*Blaklock v. Grindle*, 7 Eq. 215), for the incapacity was hers.

But it does not seem to have been decided what would be the effect of a devise, if the donee were incapable of accepting that which the testator purports to give, by reason of some law or rule of public policy; *e.g.*, whether a man would be put to his election if his lands were devised by another person to a charity or to an alien before the Naturalization Act 1870, and a legacy was at the same time given to him: the Court probably would not aid an attempt at a violation of the law (8 Eq. 175).

Widow
put to her
election by
powers to
trustees
incon-
sistent with
her rights.

12. A widow, married before 1834, will be put to her election between benefits given her by her husband's will and her dower, if the whole scope of the will show that the testator meant to provide for his wife, and that she was to have nothing but what he gave to her by his

will. (*Hall v. Hills*, 1 Dru. & War. 94; Sug. Pow. 580, n.; Hawkins on Wills, 272.)

A power of leasing given by the will to persons other than the widow, is inconsistent with her right to dower, and puts her to election; and that, too, although the power is only to lease from year to year. *O'Hara v. Chaine*, 1 J. & L. 662. "I am not aware how the power of leasing, in this case, can be exercised over all the estate, if the widow's right to dower be allowed; one can understand how the rents might be enjoyed, or the estates sold, subject to the claim for dower; but how could you demise an estate, subject to the right of this lady to have a third part thereof set out by metes and bounds." (1 Dru. & War. 107.)

Powers of
leasing.

This applies to freebench, which does not come within the Dower Act, as well as to dower; although the lands subject thereto are not by the custom set out by metes and bounds. *Thompson v. Burra*, 16 Eq. 592.

Freebench.

But powers of or trusts for sale, created by will over real estate, are not inconsistent with the widow's right to dower. Nor is her claim affected by any direction as to the distribution of the proceeds; and there is no such rule as that, where a testator's widow is entitled under his will to what would exceed her dower, she is thereby put to her election. *Bending v. Bending*, 3 K. & J. 257. In that case, a testator directed his trustees to sell all his freehold and copyhold estates, wheresoever situate, and gave his widow half of the proceeds, and also half of his personal property. She was not put to her election between the gifts in the will and her dower. See now 3 & 4 Wm. 4, c. 105.

Powers of
sale.

13. There are cases in which special directions are given as to election, by which it may be confined to particular gifts, so as to prevent election as to other parts of the will.

Qualified
election.

In *East v. Cook*, 2 Ves. sen. 30, a testator devised property belonging to his eldest son to his second son : and amongst other gifts to his eldest son, he gave him a piece of property which he stated to be in lieu of the property which he purported to take away from the eldest son. In such a case, the eldest son is merely put to his choice between those two bits of property. It is a case where the ordinary doctrine of election is excluded by an apparent expression of intention that only one of the gifts to the eldest son is conditional on his giving up what the testator purports to take away from him. (See the case explained, 6 Ch. 341.)

CHAPTER X.

FRAUDULENT APPOINTMENTS.

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1. A person having a limited power, must exercise it *bonâ fide* for the end designed ; otherwise the execution is corrupt and void. *Aleyn v. Belchier*, 1 W. & T. L. C. 339 ; 1 Eden, 132.

“ A party having a power like this (*i.e.* a limited power) must fairly and honestly execute it, without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for

Duty of
persons
executing
powers.

himself either directly or indirectly. It may be subject to directions or limitations ; but it must be a pure straightforward honest dedication of the property, as property, to the person to whom he affects or attempts to give it in that character.” “He must act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (sinister in the sense of being beyond the purpose and intent of the power).” *Duke of Portland v. Topham*, 11 H. L. C. 32.

“Any attempt to exceed the limitations of the power through the medium of any appointment to one of the objects of it in exclusion of the others, is equally invalid, whether the purpose of the donee be selfish, or, as he supposes, a more beneficial mode of effecting that which he takes the donor of the power to have desired. The Court will not allow him to interpret the donor’s intention in any other sense than the Court itself holds to be the true construction of the instrument creating the power ; and a literal execution of the power, with a purpose which it does not sanction, is regarded as a fraud on the power.” *Ibid.*, 5 Ch. 40, 59, per L. C. Hatherley.†

Purpose of execution.

2. What the Court acts upon is the fraud upon the power, in the exercise of it for purposes foreign to those for which it was created : the question in each case must be, what was the purpose for which the power was exercised.

Appointments may be fraudulent in that they were made (a) for a corrupt purpose : or (b) in consideration of an antecedent agreement with the appointee to effect objects not within the scope of the power, or (c) for purposes foreign to the power.

If made for corrupt purpose.

(a). Powers are fraudulently executed if the execution was made for a corrupt purpose.

A simple example of this is where the appointor intends a benefit to result to himself. In *Hinchingbroke v. Seymour*, 1 Bro. C. C. 395, there was a power in a settlement to raise a portion for a younger child at such time as the parent should direct: he directed it to be raised when she was 14: she shortly afterwards died, and the bill of her father, as her administrator, to have the portion raised for his own benefit was dismissed.

In *Keily v. Keily*, 4 Dr. & War. 38, Lord St. Leonards says that the Court has authority to defeat such an act as that of a father charging a portion for his child, not because the child wants it, but because the child is in delicate health and likely to die, that is, because it is likely to come to some one, not an object of the power.

In Lord Sandwich's case mentioned, 11 Ves. 479 and 4 Dr. & War. 55, a father, with a power of appointment among his children, supposing one of them to be in a consumption, executed his power in favour of that child: the Court declared the appointment void, being of opinion that the object of the appointor, when he made the appointment, was that he might himself have the chance of getting the share as the administrator of his child.

In *Rowley v. Rowley*, Kay, 242, a wife agreed with her husband to postpone her pin-money and jointure rent-charges to enable him to mortgage, in consideration of his appointing part of a fund over which he had a limited power to a younger child. V.-C. Wood said that he should have very little hesitation in saying that an appointment of that kind could not be supported if it became the interest of any parties to dispute it, although he did not find any precise case to that effect. There are numerous cases where the father has taken an advantage from the fund subject to the power of appointment. He thought it would be impossible to contend that, if a direct bribe were given to the appointor, though out of

a separate fund, that the appointment could be upheld in favour of the party to whom the fund subject to appointment was given.

In *Wellesley v. Lord Mornington*, 2 K & J. 143, where a father appointed to a son, then in a state of mental and bodily disease, of which he died within a year, the appointment was set aside, the Court inferring from the evidence as to the father's knowledge of his son's state of health and pecuniary circumstances, as to the circumstances attending the preparation and execution of the appointment, and as to its not having been communicated to the persons to whom it ought to have been communicated, that the appointment was made by the father, not for the benefit of his son, but for his own benefit, and was a fraud upon the power. And see *Gee v. Gurney*, 2 Coll. 486; *Davies v. Huquenin*, 1 H. & M. 730.

And a parent cannot bargain with his children on executing a power of appointment in their favour for the purchase of other expectant shares belonging to them.

In *Cunynghame v. Anstruther*, L. R. 2 Sc. & D. 223, a marriage settlement contained a power of appointing among children with a gift to them in default. The donees appointed parts of the fund to their three daughters. On the occasion of each appointment, the appointee declared that the appointment was in full satisfaction (*inter alia*) "of the share or division thereby allotted to her of her said father and mother's property settled by the marriage contract." The surviving donee of the power then proceeded to deal with the residue of the fund in a way not authorised by the power. It was held that his attempt to deal or negotiate with his children was invalid, and that the residue unappointed must go as in default of appointment, notwithstanding the releases executed by the appointees. It was not, however, suggested that the appointments were invalid, although they

might be said to have been made partly in consideration of the releases by the appointees.

Trustees must exercise any discretionary power they may have (*e.g.*, to consent) *bonâ fide* for the benefit of the persons for whom they are trustees. In *Eland v. Baker*, 29 B. 137, a marriage settlement contained a power for the husband and wife, with the consent of the trustees, to make void the trusts of the settlement, and to limit the estate to new uses. This power was exercised for the purpose of mortgaging the estate to one of the trustees to secure a sum advanced to the husband. The estate was afterwards sold under a power of sale in the mortgage deed. It was held that a good title could not be made.

Consent
by trustees.

If the donee of a limited power exerciseable by will only, covenants to execute the power in favour of an object, and by will in execution of the covenant exercises it accordingly, it seems doubtful whether such appointment is a fraud on the power or not; although if the sum covenanted to be appointed were not so appointed to, or left unappointed to devolve upon, the covenantee, he could recover damages from the covenantor's estate.

Appoint-
ment by
will in pur-
suance of a
covenant to
appoint.

In *Thacker v. Key*, 8 Eq. 408, A. had a testamentary power of appointment among his children, and on the marriage of one of his daughters, he covenanted that he would exercise it by appointing one-fifth to her. It was unnecessary to determine the point, but V.-C. James thought that he should have had little difficulty in holding such a covenant to be illegal and void. The power was a fiduciary one to be executed by will only, so that up to the last moment of the donee's life he was to have the power of dealing with the fund as he should think it his duty to deal with it, having regard to the then wants, position, merits, and necessities of his children. The Vice-Chancellor did not see how it could be considered right

or proper that the appointor should fetter his fiduciary discretion by a covenant executed by him in his lifetime.

But in *Bulteel v. Plummer*, 6 Ch. 160, where a testatrix with a similar power, covenanted to appoint 2500*l.* to a child, and by her will appointed accordingly, Lord Hatherley thought that it would be a very forced application of the doctrine as to appointments if it were held bad, although there was something like an improper exercise of the power, and of course the appointor tried to exonerate her own estate. The testatrix did not wish to get any benefit for herself, and he thought she was not prevented from appointing the 2500*l.* L. J. James does not touch on the question in his judgment, and it appears not to have been pressed in argument. But it is to be observed that if the appointment had been held bad, the decision of the Court on the main question in the suit would have been different; and of *Daviés v. Huguenin*, 1 H. & M. 730.

Appoint-
ments not
necessarily
bad be-
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3. But although the rule is clear that the donee of a power cannot stipulate for any benefit for himself with reference to the exercise of the power, and that if he does so the whole appointment is vitiated by the consideration that he has not made it with the simple intention of providing for the objects of the power, appointments are not necessarily fraudulent because the appointor may possibly derive some benefit from them. In *re Huish's Charity*, 10 Eq. 5, the Master of the Rolls said: "The meaning and the good sense of the rule appears to be, that if the appointor, either directly or indirectly, obtain any exclusive advantage to himself, and that to obtain this advantage is the object and the reason of its being made, then that the appointment is bad; but that if the whole transaction taken together shows no such object, but only shows an intention to improve the whole subject matter of the appointment for the benefit of all the objects of the

power, then the exercise of the power is not fraudulent or void, although by the force of circumstances such improvement cannot be bestowed on the property, which is the subject of the appointment, without the appointor to some extent participating therein." In that case the tenant for life of real estate under a marriage settlement had a power of appointing the estate among the children of the marriage, of whom there were four. The settlement contained no power of granting building leases. An appointment was made to one of the children of the marriage; and subsequently the appointor and appointee joined in conveying the estate to trustees on trust to grant building leases, and subject thereto on trust as to one-fourth for the appointee, and as to the other three-fourths on trusts corresponding to those contained in the original settlement. It was held that a good title could be made by the appointees; and see *post*, p. 347.

Appointment to enable the grant of building leases.

In *Cooper v. Cooper*, 5 Ch. 203, under the ordinary power of appointment among children, a share was appointed to an infant daughter on her marriage, and it was recited that the appointment was made in order that her share might be settled; it was so settled, but after the usual limitations to the husband and wife, and then to the children, the ultimate trust in default of children was in favour of the appointor, the father. In the same settlement, the father entered into a bond for payment of a certain sum with interest. This was held not to be such a bargain as could be supposed to have influenced the appointor's mind in making the appointment, and without which it would not have been made. The appointee was an infant, and could enter into no binding contract concerning her share, and there was no bargain to take anything out of such share, but the husband promised to settle the fund so as to deprive himself of property to which he would otherwise have been entitled

Ultimate limitation in favour of appointor.

in his marital right. But Lord Hatherley thought that if a bargain with the appointee to insert such a limitation in default of issue were proved, there would be considerable difficulty in dealing with such a settlement, although the appointor might make a provision equal or greater in value than the ultimate reversion which he took, because it was obvious that, in the event of the husband and wife dying early without issue, the father might take an interest far greater than anything he had provided. And see *Conolly v. M'Dermott*, Sug. Prop. H. of L. 513.

In *Wicherley's case*, Ambl. 234 n., a remainderman filed a bill for relief against a jointure made by the tenant for life on his death-bed, in consideration of and previous to marriage, by virtue of a power. The appointment was sustained, although the tenant for life had asked the remainderman to join in charging the estate with his debts, and on his refusing had said "I will marry and execute my power," and although he died eleven days after his marriage.

Infancy of
appointee.

Nor will an appointment be avoided merely because the appointee is an infant, and the appointor may possibly derive some benefit from the appointment: if the power be well executed in other respects, the fact that it will disappoint some persons does not appear to be such an ill motive as to make the appointment a fraud on the power and void.

In *Beere v. Hoffmister*, 23 B. 101, A. and his wife had a power of appointing a fund to her children, which, in default, was settled on the children who attained 21, and, in default thereof, on the next of kin of the wife. There were powers of maintenance and advancement. There being but one child, three and three-quarters years old, in robust health, and the wife being seriously ill, A. and his wife appointed the whole fund to the child, reserving a joint power of revocation. The child died two years

after, and her father became entitled to her property. The appointment was nevertheless held valid, no bad purpose being shown. And see *Butcher v. Jackson*, 14 Sim. 444; *Hamilton v. Kirwan*, 2 J. & L. 393.

In *Fearon v. Desbrisay*, 14 B. 635, a father had a power of appointment among his children, their shares to vest at such ages as he should appoint, and in default of appointment to vest in them at 21; and there was a gift over if there should be no child entitled under the trusts or under an exercise of the power. The father executed the power in favour of his first son at his birth, reserving a power of revocation; but afterwards, on an expected addition to his family, and being in a weak state of health, he revoked the former appointment and executed the power in favour of all his children who should be living at his death equally. It was manifest that the appointor could gain no personal advantage: for the persons in whose favour the appointment was to take effect could not be ascertained until his own death, and the intention of settlors is not to be ascertained merely from the manner in which the fund is given over in default of appointment. Accordingly one of the children having died, the appointed fund was successfully claimed by his mother, as his administratrix.

4. The burden of proving the corrupt purpose is on the party who attempts to upset the transaction: and mere suspicion is not enough: the wrong intention must be established. *Campbell v. Home*, 1 Y. & C. C. C. 664; *McQueen v. Farquhar*, 11 Ves. 467; *Pares v. Pares*, 33 L. J. Ch. 215. *Onus probandi.*

“But motives, such as circumstances of anger and resentment, under which it is alleged that appointments are made, are not to be adverted to. There would be no end to such objections, if they were to be admitted as grounds for questioning appointments: in almost all

cases, where there has been an inequality in the appointment, something of that kind has existed." Per Lord Redesdale in *Vane v. Dungannon*, 2 S. & L. 130; and see *post*, s. 10.

But the onus probandi may be shifted by the circumstances which have occurred.

In *Humphrey v. Olver*, 28 L. J. Ch. 406, it was held by the Court of Appeal that where there is proof that an appointor at one time intended a benefit to herself, the onus of proof that, at the time of the appointment, she had abandoned that intention, lies upon those who support the appointment. And where an appointment has been set aside by reason of what has taken place between the donee of a power and an appointee, a second appointment by the same donee cannot be upheld otherwise than by clear proof on the part of the appointee that the second appointment is perfectly free from the original taint which attached to the first. *Topham v. Duke of Portland*, 5 Ch. 40, 62.

Costs of
trustees.

The Court watches with jealousy transactions between parent and child occurring shortly after the child has attained twenty-one, more especially where the transactions have had their inception during the minority of the child; and the Court will support trustees in exercising the same jealousy which the Court itself is in the habit of exercising. It must be ascertained, of course, that the trustees have acted *bonâ fide*, and have been influenced by no corrupt or improper motives: but if it appears that they have so acted, it is the duty of the Court to support and not to punish them. *King v. King*, 1 D. & J. 663.

Liability of
trustees.

And although trustees ought not to be astute in suspecting fraud, and may be made to pay costs if they raise untenable objections to acting upon appointments (*Campbell v. Home*, 1 Y. & C. C. C. 664), yet if they part

with the fund improperly, they will have to replace it. In *Mackechnie v. Majoribanks*, 18 W. R. 993 ; 39 L. J. Ch. 604, the donee of a limited power appointed the whole trust fund to her daughter, one of the objects of the power, who was about to be married. The money was paid by the trustee at the daughter's written request of even date with the appointment to the mother's banking account, and part of it was expended by the mother for her own purposes. She died insolvent. The trustee was held liable at the suit of the persons entitled in default of appointment to replace the fund. V.-C. James thought that the letter and the appointment really formed one transaction: it was as if the deed of appointment had contained a recital that it had been agreed that the money should be paid to the mother's account to be at her disposal.

5. (b.) The execution may be fraudulent and void, on the ground that it was made in pursuance of an antecedent agreement by the appointee, to benefit persons not objects of the power, and that, whether the agreement be in itself unobjectionable or not.

In consideration of antecedent agreement.

The appointor cannot stipulate for any advantage to himself.

For appointor's benefit.

In *Farmer v. Martin*, 2 Sim. 502, the appointment was made in consideration of an agreement to pay the appointor's debts, and to provide for his illegitimate son. And see *Skelton v. Flanagan*, Ir. R. 1 Eq. 362 ; *Lee v. Fernie*, 1 B. 483.

In *Askham v. Barker*, 12 B. 499, the appointor had obtained part of the trust funds subject to the power, from the trustee, in breach of trust: he appointed to

some of the objects of the power on an agreement that they should not make any claim against the trustee, or call on him (the appointor) to pay the amount.

In *Reid v. Reid*, 25 B. 469, the appointment was made in discharge of an antecedent debt. In *Arnold v. Hardwick*, 7 Sim. 343, in consideration of an agreement to lend the appointed fund to the appointor on good security: these were all held bad.

For benefit
of stran-
gers.

The appointor cannot stipulate for any benefit to any person not an object of the power.

In *Carver v. Richards*, 1 D. F. & J. 548, A. was entitled for life to certain estates, with a power of appointing them among her children. She appointed to her eldest son, on a bargain between herself, her husband, and the son, that the estates should be settled, subject to the wife's life estate, to the use that the husband should receive a rentcharge for life, and subject thereto to the use of the children as the husband and wife should jointly appoint, or as the wife, if she survived, should appoint: this was held bad.

In *Salmon v. Gibbs*, 3 De G. and Sm. 343, the donee of a power of appointment among children appointed almost the whole fund to one of her two daughters, on an understanding, but without positive agreement, that the appointee would resettle one moiety of it on trusts for the separate use of the other daughter (who was married) for life, exclusively of her husband, and after her death for her children. A resettlement was accordingly made without the privity of the married daughter, who did not hear of it until several years after. On the husband's suit, the appointment was declared invalid.

Appoint-
ment and
contempo-
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settlement
good.

6. But an appointment to a child, an object of the power, and a contemporaneous settlement by him of the appointed fund, is valid, unless it

can be shown that the appointment was made in pursuance of a contract. *Goldsmid v. Goldsmid*, 2 Ha. 187; *Birley v. Birley*, 25 B. 299; 27 L. J. Ch. 269; and see Sug. Pow. 672-3.

“If I have a right to appoint an estate to one of my children, and that child joins with me in a settlement of the estate upon his children, although the grandchildren, who may be thus provided for, were not objects of the power, yet, the child joining with me in that instrument, the Court would consider this as an appointment of the estate to the child, and then a disposition of it by him in favour of the grandchildren, although not objects of the power.” Per Lord St. Leonards in *Thompson v. Simpson*, 1 Dr. & War. at p. 487.

And the donee of a limited power of appointment may well execute it in favour of an object of the power, though he believes and knows that the appointee will at once dispose of the property in favour of persons who are not objects of the power. But if, besides this belief and knowledge, there is a bargain between the appointor and appointee that the appointee shall make a disposition in favour of persons not objects of the power, and the just result of the evidence is that the appointment would not have been made but for the bargain, then the appointment is void. *Pryor v. Pryor*, 2 D. J. & S. 203.

Appointor's knowledge of appointee's intention to settle.

When the exercise of a power in favour of a child and the settlement of that child's share (she being about to be married) are made at the same period by contemporaneous instruments, though in form perhaps the instruments may not appear to be correctly framed, yet the Court regards it as an agreement on the part of that child that her share should be so settled, and the transaction is treated as an appointment made to her of her

share, followed by the settlement of the share through the medium of the interest that she so acquires by virtue of the appointment. *Daniel v. Arkwright*, 2 H. & M. 95. In that case the power was to appoint among children: an appointment by deed poll was made to the trustees of a marriage settlement of even date of one of the children on the occasion of her marriage. This was held good: but an appointment by deed in favour of another daughter already married, her husband, and children, was held bad, for the daughter could not deal with her share by exercising any will of her own with reference to a settlement. (*Ibid.*)

There must
be no ante-
cedent con-
tract.

There must be no antecedent contract between the parties; a bargain between the donee and the object of the power to make a provision for persons not objects of the power without any benefit to himself would vitiate the appointment. The question is, In what character does the appointee take the property? If for his absolute benefit, the appointment is good; but if for the purpose of distribution amongst persons not objects of the power, the appointment cannot be supported. *Birley v. Birley*, 25 B. 299; 27 L. J. Ch. 569. The case of *Tucker v. Tucker* (13 Price, 607), if at variance with this, cannot be supported. In that case, the appointor appointed to an object of the power in fee, but by a subsequent deed and, *pursuant to an agreement made prior to the execution of the power*, a term of years was created to provide for certain costs and to raise annuities, and subject thereto, the estate was settled to the use of the appointee for life, with remainder to his children, strangers to the power. This appointment was held good. But in *Cutler v. Sanger*, 2 You. & J. 459, the same settlement was held by the same judge to be merely voluntary, so far as it gave interests to the appointee's children, as against the appointee's creditors: this showed that the antecedent

agreement was not binding on the appointee. And see Sug. Pow. 671—673.

It has also been held that under a power to appoint among children, interests may be given to grandchildren by way of settlement with the concurrence of their mother, an object of the power, and her husband. *White v. St. Barbe*, 1 V. & B. 399; *Wright v. Goff*, 22 B. 207.

Interests may be given to grandchildren (not objects) by way of settlement.

In *re Gossett*, 19 B. 529, the Master of the Rolls says the cases establish this proposition, that what may be done by two deeds shall not fail because it is done by one, where it appears to have been done with the assent of all parties, who, perfectly knowing what their rights were, endeavoured to carry them into effect. And see *Cunynghame v. Anstruther*, 2 Sc. & D. 223, at p. 234. "

It makes no difference whether the subject matter of the power be property in possession or reversion (*re Gossett*, 19 B. 529); and, as a husband can dispose of his wife's reversionary interest in personalty against every one except his wife if she survive him, it is immaterial that the wife, the object of the power, is a minor. *Fitzroy v. Duke of Richmond*, 27 B. 190.

Reversionary property.

It has also been held that in an arrangement settling the interests of all the branches of a family, children may contract with each other to give to a parent who has power to distribute property among them some advantage, which the parent, without their contract with each other, could not have.

Family arrangement may be valid.

In *Davis v. Uphill*, 1 Sw. 129, an estate being limited under a marriage settlement to A. for life with remainder to her children as she should appoint, with remainder to all the children equally, an agreement by the children that on her joining in suffering a recovery, the first use to which the recovery should enure, should be to A. for life *without impeachment of waste* was held valid.

And in *Wright v. Goff*, 22 B. 207, A., a married woman,

was the sole object of a power of which B. (the tenant for life of the fund) was the donee, and an arrangement was made between A. and her husband and B., in pursuance of which an appointment of the whole fund was made to A. at once, and she and her husband then resettled the fund, giving interests to A.'s husband and children. The husband survived his wife. It was considered that this was a family arrangement for a resettlement, and that the husband and his representatives were bound by it. And cf. *Beddoes v. Pugh*, 26 B. 407, a case which shows that the Court must act on the provisions of a deed until it has been declared to be invalid.

7. (c.) The execution is fraudulent and void if made for purposes foreign to the power, although such purposes are not communicated to the appointee previously to the appointment, and although the appointor derive no personal benefit.

The intention of the settlor is to be strictly followed.

“The purpose of the author of a settlement, by which a power is created, is to benefit the objects within the range of the power. If the power be exercised beyond that range, his intention is that the property, the subject of the power, shall go to those who are entitled in default of appointment. When therefore it is asked that effect may be given to an appointment, which has for its object to go beyond the power, it is in truth asked that the unauthorised purpose of the donee may be preferred to the authorised purpose of the donor, and that, to the prejudice of those who would be entitled but for the donee's unauthorised purpose.” Per L. J. Turner, 1 D. J. & S. 568.

In *Topham v. Duke of Portland*, 1 D. J. & S. 517 ;

11 H. L. C. 32, the duke, having a power of appointing portions among his younger children, appointed a double share to a younger child without previous communication with him. It appeared that the purpose of the appointment was, that one half of the double share should be held in trust, and the income accumulated during the life of the appointee and twenty-one years afterwards, or until the successor to the dukedom should direct such half and the accumulations to be paid to another child, who had been excluded on account of an intended marriage disliked by the appointor. In the absence of such directions, the said half and the accumulations were to be paid to the appointee. The appointee, soon after the appointment, executed a deed settling the moiety accordingly. It was held that the purpose of the appointment of the said half, although not communicated to the appointee, vitiated it as to that portion.

In *Re Marsden*, 4 Drew. 594, the objects of the power were the children of the marriage: the donee (the wife) desired to benefit her husband: to effectuate this, she appointed to her eldest daughter unconditionally on the face of it, but under an arrangement between the appointor and her husband that, on the appointor's death, the daughter should be informed by her father of the intention with which the appointment was made, and so be induced to carry out that intention. V.-C. Kindersley, p. 601, says:—"It is not necessary that the appointee should be privy to the transaction, because the design to defeat the purpose for which the power was created will stand just the same, whether the appointee was aware of it or not: and the case of *Wellesley v. Mornington* shows that it is not necessary in order to bring the case within the scope of the jurisdiction on which this Court acts, that the appointee should be aware of the intentions of the appointment, or of its being actually made."

Appoint-
ment in
considera-
tion of
residing
abroad.

In *D'Abbadie v. Bizoin*, Ir. R. 5 Eq. 205, A. had power to appoint certain lands among her children in such shares and proportions as she pleased : she devised part thereof to a trustee, on trust to sell and lay out the proceeds in the purchase of freehold property in France, and to convey the property so purchased to the testatrix's second son in fee, provided he should previously decide to reside in France : but if he decided not to reside in France, then she devised the property so purchased to another of her sons. The Court said that, on the face of the will, it was apparent that the devise to the second son was one which resulted from an intention on the part of the donee of the powers to induce her son to reside in France, by giving him property which had belonged to another person, and over which the testatrix had only a power of appointment. The testatrix held out an inducement to her son to reside in France : that was an indirect object, not warranted by the power, and so inseparably connected with the devise or appointment that it made it fail entirely.

The
settlor's
intention
is to be
collected
from his
deed only.

§. Whatever may be the intention of the donor of a power, such intention can only be dealt with as it is expressed in his deed, and the power must be exercised within the limits which the deed creating it prescribes.

And it makes no difference that the settlor is himself the donee of the power : if he declare trusts, reserving a power to be exercised for the benefit of a limited class only, he cannot alter that destination of the property. *Lee v. Fernie*, 1 B. 483.

In *Topham v. Duke of Portland*, 1 D. J. & S. 517, the second question was this :—The late duke declared that

trustees should hold certain funds after his death on trust for his daughters, H. and M., or one of them, as his son (the present duke) should appoint, and in default of appointment should pay the dividends to H. and M. in equal shares during their joint lives, with remainders over. At the time the settlement was made, the settlor objected to a proposed marriage of M., and made the settlement in order that, in the event of the marriage, the income should be appointed as to one-half for H., and as to the other half, to be dealt with according to circumstances. After the death of the settlor, M. married: the present duke thereupon appointed the income of the whole fund to H. for life, reserving a power of revocation. H. was not informed of the appointment, and it was shown that the intention of the present duke and of H. was to accumulate one moiety of the income and to hold it in suspense. The Lords Justices were of opinion that the deed creating the power did not authorise an entire suspension of the enjoyment of the fund for the purpose of accumulation during an indefinite period: and that an appointment of the whole had been made to H. without any intention of giving her any benefit in one moiety, and for the express purpose of its being accumulated, the accumulations to be disposed of as eventually the present duke should direct, and that she had assented to such arrangement. And moreover, that the control of M.'s share could not be delegated to H.

The House of Lords (11 H. L. C. 32) affirmed the decision of the Lords Justices on the simple ground that H. had in reality no knowledge of the deed of appointment, and that it was evident from the slender information communicated to her, and from the reservation of the power of revocation, that she was not intended to have any real ownership or control over the fund.

This execution of the power having been declared void,

the present duke executed a second deed of appointment, appointing the income to H. during the joint lives of herself and M. absolutely. H. was duly informed that this appointment had been made, and she and the duke deposed that there was no agreement between them as to the disposition of the income. In *Topham v. Duke of Portland*, 5 Ch. 40, this was also held invalid. The Lord Chancellor (Hatherley) thought that a valid appointment might have been made to H.: but the real point for consideration was, whether or not, though now conscious of her strict right at law to dispose of the fund, the pressure of a moral obligation not to appropriate more than one-half of it to her own use, and to hold the other half subject to the duke's intentions and for his purposes, did not, at the date of the last appointment, and still, weigh on her mind with such force as to convert her into a mere passive instrument of the duke's intentions, and whether such her sense of moral obligation was not well known to the duke: and if so, whether he had taken any step whatever to discharge her from it, and restore her to complete freedom of action?

Where the
appointee
repudiates
the con-
dition.

9. It does not appear to be entirely settled whether an appointment, made on the appointor's part for an improper purpose, but innocent, so far as the appointee is concerned, is effectual, if the appointee on being appealed to by the appointor to effectuate his purpose, refuses to do so: it seems the better opinion that such refusal would make no difference, but that the appointment would fail.

From the Lord Chancellor's judgment (5 Ch. 58) it would appear that the second appointment to H. would have held good, if the Court had been convinced that her conscience was not bound: (the appointor had deposed that he had appointed *bonâ fide* without ulterior motive). But in *Re Marsden's Trusts*, 4 Drew. 594, the appointment was made unconditionally, and the purpose of the

appointor was not communicated to the appointee until afterwards. But the appointment was held void, and the appointee's petition for payment out of the fund appointed was dismissed, on the ground that the appointor's intention was to exercise the power in such a manner as to defeat the real purpose thereof. The Court said that it was not necessary that the appointee should have any previous knowledge, but the purpose of the donee must be matter of proof. In *Scroggs v. Scroggs*, Amb. 272, the consent of a trustee was necessary to the exercise of a power, and the donee obtained the trustee's consent by a false representation, to which the appointee does not appear to have been a party: yet the Court set aside the appointment.

But suppose (as Lord Cairns suggested, *arguendo*, 1 D. J. & S. 555) that the child to whom the appointment was made in *Wellesley v. Mornington*, 2 K. & J. 143, had recovered, or, in that case, refused to carry the scheme into effect, could the appointment have been set aside? Semble, the appointment would be bad as against the persons entitled in default.

If there was such evidence of the purpose of the appointor as the Court could take into its judicial cognizance, whoever the person may be who is ultimately benefited by the fraudulent execution of the power (*i.e.*, whether appointor or appointee) the appointment would be equally a fraud on the other objects or the persons entitled in default, if it was made for an improper purpose; and cf. *Rowley v. Rowley*, Kay, 242, where V.-C. Wood said that a bribe given by a third person to the appointor would vitiate the appointment. The question to be asked in each case is, Would the appointment have been made, if it had not been for the improper intention of the appointor? What the Court acts upon is the fraud on the power in the exercise of it for purposes foreign to

those for which it was created. (1 D. J. & S. 569, 570.)

And the Master of the Rolls' remarks in *Topham v. Duke of Portland*, 31 B. 541, have some bearing on the point:—"If the appointee refuses to give effect to the wishes of the appointor, he gets what it was never intended he should have, and enjoys property which, if his conduct could have been foreseen, might and probably would have been given to another. The case is exactly the same whether the consent or the agreement to act as desired be given or entered into before or after the appointment. The Court also would be placed in this dilemma: if it did not enforce compliance with the wishes of the appointor, it would be sanctioning the appointee in taking property never intended for him; and if the Court were to enforce it as binding in conscience on the appointee, the Court would enforce the execution of a power in favour of persons who were not objects of it."

Distinction
between
motive and
intention
or purpose.

10. It has been seen (s. 4) that the Court will not advert to motives: but a distinction has been taken between motives and intention or purpose.

The L. J. Turner (1 D. J. & S. 571) says:—"It is one thing to examine into the purpose with which an act is done, and another thing to examine into the motives which led to that purpose: and what we have to do is to look to the purpose of the act which was done, and not to the motive which led to it." This is adopted by L. C. Hatherley (5 Ch. 57), and he applies it to the case of *Topham v. Duke of Portland*, thus:—"If the duke, truly preferring H., either on the ground of her sister's supposed disobedience to her father's wishes in her marriage, or for any other reason, however capricious, intended simply to give the property to her in preference to her sister, he is by the power authorised to do so. If he, on the contrary, has not any such intention, but has exe-

cuted the instruments with the intent that H., having the sole control of the fund, should abstain from dealing with it as her own, and should accumulate one moiety of it, in order (according to events) either to dispose of it for her sister's benefit, or to let it fall back according to the limitations in default of appointment, then I think that the distinction taken by L. J. Turner between intent and motive would apply. The difficulty of the case lies in this, that the intent is not always capable of demonstration. In cases where the nominal appointee has engaged beforehand to execute the unauthorised intent, another equitable principle, that of trust binding the conscience of the appointee, is introduced : but the existence of the intent on the part of the appointor, as evidenced by the communication to the appointee, after the appointment had been made, of a purpose inconsistent with the power, was in *Re Marsden's Trusts* held sufficient to vitiate the appointment, though the appointee had not, before the appointment, been privy to the arrangement."

11. A purchaser for valuable consideration from the appointee without notice is not affected by the fraudulent execution of the power ; and the notice must be actual, not constructive notice.

Purchaser for valuable consideration without notice protected.

In *M'Queen v. Farquhar*, 11 Ves. 467, estates were settled on A. for life, with remainder to his wife for life, and the settlement contained an exclusive power of appointing among children : A. entered into a contract for the sale of the estates, and afterwards appointed the fee (subject to the life estates of himself and his wife) to his eldest son : and the three thereupon conveyed the estate to the purchaser in consideration of a sum expressed to be paid to all of them. Lord Eldon overruled an objec-

tion that the appointment appeared to have been made in pursuance of a previous agreement, and that if A. derived any benefit from that agreement, which seemed probable, or even if he had previously stipulated that his son should join him in the sale, which seemed most probable, it would be a fraudulent execution. And see *Warde v. Dixon*, 28 L. J. Ch. 315; Sug. Pow. 616; *Cockroft v. Sutcliffe*, 25 L. J. Ch. 313; *Hamilton v. Kirwan*, 2 J. & L. 393; *Askham v. Barker*, 17 B. 37; *Rhodes v. Cook*, 2 S. & S. 488; *re Huish's Charity*, 10 Eq. 5.

But not if
he have
notice.

But it will be otherwise if the purchaser have actual notice of the fraud. *Palmer v. Wheeler*, 2 B. & B. 18.

In *Hall v. Montague*, 8 L. J. Ch. 167, a father, the donee of a power of appointment among his children, agreed, three years before his eldest son attained twenty-one, to sell part of the settled estates to A.; and he covenanted with A. that he, his wife, and such of his children as he should appoint to, would within three months after their eldest child should attain twenty-one, convey to A.; the purchase-money was to be paid to the father. An appointment to a child and a conveyance by the parents and such child were accordingly made to the purchaser. This whole transaction was set aside nearly thirty years after, at the suit of the younger children. Sir John Leach, in considering the question whether A. was affected with notice said, that the agreement provided that the purchase-money should be paid to the father, and the agreement was with the father alone. In *M'Queen v. Farquhar* (11 Ves. 467), there was not sufficient evidence to show that the purchaser knew that the purchase-money was to be applied for the benefit of the father alone. The purchaser might very reasonably (Lord Eldon thought in that case) infer that the son was to take his fair proportion of the value of the reversion; but could anybody reasonably infer in the

case before the Court that the son was to have the benefit of his fair proportion? or that A. was not aware that the money, though nominally paid to the father, wife, and eldest son, was really paid to the father. In the first place there was A.'s covenant that it should be paid to the father; and, in the next, the conveyance to A. did not recite the truth of the case. He did not suppose that A. was *personally* a party to the fraud; but those who drew the conveyance knew that it was a fraudulent transaction. He was of opinion that all who claimed under it were affected by the fraud of the transaction.

And of course the purchase must be from an object of the power of a share appointed to him, and not from the appointor. The payment of a money consideration cannot make a stranger become the object of a power created in favour of children: he can only claim under a valid appointment executed in favour of some or one of the children. *Daubeny v. Cockburn*, 1 Mer. 626.

Purchase
must be
from ap-
pointee

12. It is in most cases impossible for the Court to sever appointments which are fraudulent; such appointments are as a general rule void *in toto*; for the Court cannot know whether the power would ever have been exercised, if it had not been for the corrupt motive. Where there is an appointment made by a father to a child of a given sum of money, out of which he is to be paid something for making it, it is quite impossible to separate the appointment by dividing it into two parts, and to say, so far as the donee was guided in his wish to provide for his child, it is good, and therefore the Court will support it: but so far as he wished to benefit himself from the fraud, it is bad; because the party in remainder might say that the donee was not actuated in the appointment by love to his child or by the wish to provide for him, or at all events, it was so mixed up with his

Appoint-
ments
cannot be
severed.

own benefit that it was impossible in any way to sever the two motives and to say how much was to be attributed to the one and how much to the other, and therefore, the motive for his doing the act at all, being a desire to benefit himself, was fraudulent, and the subsequent act depending upon that motive must be set aside. (Kay, 263.) Thus, if a man have a power of appointment among children and he appoint 3000*l.* to one child on an agreement to take back 1000*l.* the appointment will not be good as to 2000*l.*, but will fail *in toto*. The general rule is that

Appointments cannot be severed, so as to be good to the extent to which they are *bonâ fide* executions of the power, but bad as to the remainder, except where some consideration has been given which cannot be restored, and it has, consequently, become impossible to rescind the transaction *in toto*, and to replace the parties in the same situation, or where the Court can sever the intentions of the appointor, and distinguish the good from the bad. *Daubeney v. Cockburn*, 1 Mer. 626 ; *Topham v. Duke of Portland*, 1 D. J. & S. 517.

And the fraud may run through several appointments and infect them all : in such a case, if all the appointments appear to be part of one fraudulent design, all will be set aside. See *Askham v. Barker*, 12 B. 499 ; *Farmer v. Martin*, 2 Sim. 502 ; *Agassiz v. Squire*, 18 B. 431.

V.-C. Wood, in *Rowley v. Rowley* (Kay, 242, 258), distinguishes three classes of cases ; he says, Three classes of cases.

“ With regard to the position of this doctrine as to powers, there are three different and distinct classes of cases. There is, first of all, the case in which there may be a fraud on the donor of the power, or those who claim under him, by the person who takes the fee simple or other estate which is the subject of the power. There may be cases in which the fraud is on him alone, there being only one person interested in the charge which may have been created, as in the case of a jointure, and many other similar cases, such as, for example, a power of raising a given sum of money out of a given estate, for a single individual, and if the power be exercised, so as to enable the donee of the power to raise money upon it for a purpose of his own, it is a fraud upon the donor of the power and the party claiming through him that any part of that sum should be raised for any purposes except those prescribed by the power. First class of cases.

“ A second class of cases is where the fraud may be wholly on the parties who are interested in the distribution of the fund and cannot be in any way a fraud upon the donor of the power, that is, the charge would remain whether the power be exercised or not, but the distribution of the fund would be the only point in question. That is the case I have before me. It is a case in which 30,000*l.* would be necessary to be raised, whether there were any appointment under the power or not ; and therefore the fraud, if any, is one which would affect the persons only who are interested in the distribution. Second class of cases.

“ There is also a third class of cases, which comprehends both the classes I have just mentioned, namely, where the power is to create a charge as well as to distribute it under certain circumstances, or to particular Third class of cases.

individuals, in which case it would be a fraud to have the power exercised at all if the circumstances had not arisen, or for the benefit of parties who were not interested in it and who were not intended to be interested in it. The owner of the estate in the last class of cases would be entitled to say, it never was intended to be distributed except in a fair, upright and honest manner, as between all parties interested in the charge."

First class
of cases.
Exception.

With regard to the first class of cases, an exception has been established in favour of jointures.

In *Lane v. Page*, Ambl. 233, the donee of a power to jointure, being in debt, executed his power to its full extent previously to his marriage. He had agreed with his future wife that she should join in levying a fine, the use of which was partly for the wife's benefit and partly for the payment of his own debts. The execution was set aside so far as related to the husband's debts, but was supported so far as it was for the wife's benefit. In this case, the subsequent marriage was a consideration that could not be restored, and the case might have been decided on that ground. But in *Aleyn v. Belchier*, 1 Eden, 132, 1 W. & T., L. C. 339, the power was executed after marriage. It is to be observed, however, that in this case the bill contained a submission to pay the jointure so far as the power was executed *bond fide* for that purpose, and only sought relief against the other objects of the appointment. However, V.-C. Wood says, that in the case of a power to jointure, nobody is interested but the one party, the jointress; and therefore, if the charge be raised under a corrupt bargain, or one by means of which some benefit is to be handed over to the husband, the Court will, and it has done so in several cases, sever the appointment and hold it to be good to the extent to which the jointress is entitled, but will hold it to be bad with reference to the corrupt and improper use that may

be made of the surplus. He remarks, however, on the difficulty of reconciling this with the general rule, but agrees with Lord St. Leonards (Pow. 612) that the doctrine as to jointures is not likely to be now disturbed. (Kay, 259.)

Where the subject-matter of the power is in existence and the donee of the power has merely to select the objects or to distribute the fund among them, an appointment to one object, which is for any reason fraudulent, does not necessarily vitiate appointments to other objects. If the particular appointment which is fraudulent is one complete independent act, other appointments to other objects, although made by the same deed, will not be affected. In the words of Lord Hardwicke (Ambl. 235), "Fraud will affect only so far as it extends;" but the bounds between the good and the bad must be clearly defined, in order that part of the appointment may prevail.

Second
class of
cases.

"In the case of distribution among several objects of a power, where there is a clear right in all the parties interested in the distribution, it is a novel thing to say that the fund is to be considered as one gross fund, which is to be fairly apportioned among the different persons interested, and that, to the extent to which the donee of the power takes out of the common fund any portion whatever from which he is himself to receive a benefit, to that extent he has diminished the common fund, which ought to be appropriated amongst all, and having diminished it to that extent, the Court will not permit him to have any further power over it, but will consider the right of the other parties to be determined as from that moment, the object of the donor being to have a fair and equal distribution of it. All the cases that have happened have been cases confined expressly to the mode of dealing with those shares which have been taken out of the common fund by means of the corrupt bargain.

A A

I find no case applying at all to the balance of the fund which remains after that share has been so taken out. The Court has said, that share at least we will bring back : and all the cases have gone to that extent and no further. There is no decided case in which a father, having power of making a distribution among eight or nine children, having made a corrupt bargain with one of those children, the appointments to the other children have therefore been set aside." Per V.-C. Wood, *Rowley v. Rowley*, Kay, 261.

In that case, a husband and wife lived apart, and the wife had the care of one of their two younger children. The husband being desirous of raising money by mortgage of his settled estates, and being unable to do so on account of the existing charges thereon, applied to his wife to postpone her pin-money and jointure annuities to his proposed mortgages. The wife consented, provided that the husband would exercise a power of appointment which he had over a sum of 30,000*l.* in favour of his younger children, to the extent of appointing 5000*l.* to the child under her care. He did so, and by a similar deed dated the next day, reciting the former appointment, he appointed the rest of the fund to his only other younger child. It was held that, although the bribe to the husband would affect the validity of the appointment of the 5000*l.*, yet that the appointment of the 25,000*l.* was not so connected with the former appointment as to be also invalid ; nor, indeed, was the motive for the latter appointment the same as in the former case, for, instead of being an inducement to the wife to consent to the proposed arrangement, the second appointment, if revealed to her, would probably have prevented her concurring and postponing her pin-money and jointure. And see *Harrison v. Randall*, 9 Ha. 397.

When
single ap-

An appointment of a gross sum to one object may be

upheld as to part, if the evidence is such as to enable the Court to distinguish what is attributable to a proper from what is attributable to an improper purpose. pointments are severable.

In *Topham v. Duke of Portland*, 1 D. J. & S. 517, 11 H. L. C. 32, the donee of a power of appointing portions among his younger children appointed a double share to a younger child without previous communication with him. But it appeared from the instructions for the appointment, that its purpose as to half of the double share was not authorized by the power. It was held that such purpose vitiated the appointment as to the moiety only. L. J. Turner (p. 572), said that the general rule (that where an appointment is made for a bad purpose, the bad purpose affects the whole appointment) applied to cases in which the evidence did not enable the Court to distinguish what is attributable to an unauthorized, from what is attributable to an authorized, purpose. But if the evidence enabled the Court to make the distinction, the foundation on which the rule rests, viz., the impossibility of distinguishing what is attributable to one purpose from what is attributable to another, wholly failed, and the general rule could not apply.

In *Rankin v. Barnes*, 33 L. J. (Ch.) 539, 12 W. R. 565, the donee of a power of appointment among children appointed two-sixths to a married daughter, with a view of enabling the daughter's husband, with one-half of the appointed fund, to pay a debt which he had incurred on account of his wife's brother, an object of the power. The appointment was held invalid, but only as to one moiety.

The third class of cases mentioned by V.-C. Wood (viz., where the subject-matter of the appointment has both to be called into existence and to be distributed) will be subject to the rules above stated, according to Third class of cases.

the circumstances of each case. Thus, under a power of raising and exclusively appointing 10,000*l.* to children, if the whole sum was raised and appointed on a corrupt bargain, it would be void as well as to the raising as to the appointment. But if part only were corruptly appointed, the taint in that part would not vitiate a good appointment of the rest (as before stated), and it follows that the direction to raise would not be invalid as to the whole sum, but only as to so much thereof as was improperly appointed. See *post*, "Powers of Charging."

Fraudulent releases.

13. It has been seen (*ante*, p. 14) that limited powers may be released; but such releases must not be made fraudulently. In *Cunningham v. Thurlow*, 1 R. & M. 436, n., a fund was limited to a father for life with remainders to his children in such shares as he should appoint, and in default of appointment to the children equally. The father released his power as to a part of the fund so as to vest it in himself as the personal representative of a deceased son. But V.-C. Shadwell, although of opinion that the power was extinguished by the release, refused to give present effect to the release so far as it operated to vest a share of the fund in the father. However, in *Smith v. Houlton*, 26 B. 482, the donee of an exclusive power of appointment among children over a fund which, in default of appointment, was limited to them equally, was beneficially entitled, in default of any appointment by himself, to one-third of the fund as representative of a deceased child. He assigned the said third share to his mortgagees and released his power. It was held that the power was effectually released, and the rights of the parties consequent thereon were declared.

CHAPTER XI.

DELEGATION AND SURVIVORSHIP OF POWERS.

<p>1. <i>Delegatus non potest delegare</i> 357</p> <p>2. Powers to do merely ministerial acts may be delegated 360</p> <p>3. No delegation in cases of absolute ownership . . . 362</p> <p>4. Does a power to mortgage authorize a mortgage with a power of sale? . . . 363</p> <p>5. Involuntary delegation: bankruptcy: judgments: lunacy 365</p>	<p>6. Survivorship of powers . 367 <i>Distinction between powers and trusts</i> <i>ib.</i></p> <p>7. Power given to persons named 370</p> <p>8. Power given to several as a class 371</p> <p>9. Power annexed to office . 372</p> <p>10. Powers arising by implication 376</p>
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1. IN considering the delegation of powers, the distinction between powers amounting to absolute ownership, powers implying personal discretion, and powers to do acts merely ministerial, must be borne in mind.

In *Combe's Case*, 9 Rep. 75, the things which a man cannot do by attorney, *i.e.*, the acts which he cannot empower another to do for him, are considered. "If a man has a bare authority coupled with a trust, as executors have to sell land, they cannot sell by attorney: but if a man has authority as absolute owner of the land, there he may do it by attorney. . . . Also there is a difference betwixt a general absolute power and authority as owner of the land, as aforesaid, and a particular power and authority (by him who has but a particular interest) to make leases for life or for years. And therefore if A. be tenant for life, the remainder in tail, &c., and A. has power to make leases for 21 years, rendering rent, &c., he cannot make

a lease by letter of attorney by force of his power, because he has but a particular power which is personal to him, and so was it resolved in *Lady Gresham's Case*, 24 Eliz., by Wray and Anderson, C. JJ."

The rule is that

*Delegatus
non potest
delegare.*

A power involving the exercise of personal discretion by the donee cannot be delegated ;
delegatus non potest delegare. Sug. Pow. 179.

In *Ingram v. Ingram*, 2 Atk. 88, A. had power under a settlement to dispose of an estate in such proportions as he should think fit among the issue of his marriage. By his will he delegated this power to his wife to exercise as she should think fit. The power was held to be exerciseable by the husband only, and not in its nature transmissible or delegatory to a third person : the attempted delegation was expunged, and the remainders over in default of the execution of the delegated power took effect.

In *Chester v. Chadwick*, 13 Sim. 102, power was given to A. to appoint among his children in such proportions, &c., as he should think fit, and A. appointed by his will that his wife should receive the dividends during her life and apply the same in the exercise of her sound discretion for the best interest and advantage of his children ; this was held not a good execution. And see *Alexander v. Alexander*, 2 Ves. sen. 640 ; and *Attorney-General v. Berryman*, cited *ibid.*

In *Carr v. Atkinson*, 14 Eq. 397, the donee of a power of appointment among issue appointed a life-interest to A., a child, and then purported to give a power to that child to appoint a life-interest to any husband with whom she might intermarry, and subject thereto, appointed the corpus of the property to the children of A.

The Master of the Rolls said that the power to appoint in favour of the husband failed, being a delegated power which could not be given by the person who was entitled to exercise the first power, and the will was to be read, as if the words relating to it formed no part of it, and the construction of the rest of the will was not affected by it. And see *Webb v. Sadler*, 8 Ch. 419.

A person whose consent is required to the execution of a power cannot, by a general power of attorney given to another to consent for him to any deed which the attorney shall think fit, effectually delegate his power of consent: but the execution of the power will be altogether void. *Hawkins v. Kempe*, 3 East, 410.

Delegation of power to consent.

But it seems that a trustee in England, entrusted with the management of property abroad, may execute such trust by attorney, without special authority: the exception arising out of the necessity. *Stuart v. Norton*, 9 W. R. 320.

Exception.

There cannot usually be much doubt whether a power involves the exercise of discretion or not: it may be observed, however, that a power of leasing is a trust power requiring discretion in its exercise. Lord Westbury says, that in the execution of the duty or office of granting leases, much judgment is required to be exercised. The fitness and responsibility of the lessee, the adequacy of the rent, the length of term to be granted under the circumstances, and the nature of the covenants, stipulations, and conditions which the lease should contain, are matters requiring knowledge and prudence. The power to lease may be a trust power, in the sense of its being the duty of the trustee to avail himself of it under proper circumstances; but it is to be exercised by a person selected for the purpose, and not by any other person. *Robson v. Flight*, 4 D. J. & S. 614. The same remarks apply to some extent to powers of sale.

Power of leasing requires discretion.

Powers
operating
under the
Statute of
Uses.

Powers operating under the Statute of Uses must in especial be strictly construed, and must be executed by the person named. One of the cardinal principles of the law of uses is this, that a new use will not arise unless the conditions and terms on which it is to come into being are strictly followed.

The Court has no power to alter the effect of a settlement made under the statute. If an estate has been once settled in a course of legal devolution under the statute, the only method by which those uses can be abrogated is by the exercise of a power reserved in the settlement of revoking those uses: such a power is a power in derogation of what has been already done, and must be strictly pursued. "Where there is a conveyance by lease and release to uses, with power to alter the uses by an instrument, the terms and limitations of which are prescribed by the general law, the new use will not arise except under the very circumstances in which it is contracted that it shall arise." Per Lord Eldon, *M'Queen v. Farquhar*, 11 Ves. 475.

Accordingly, a power of sale and of limiting new uses in a settlement given to A. and B. and the survivor of them and the executors and administrators of such survivor, could not be exercised by a trustee appointed by the Court before Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 27). *Newman v. Warner*, 1 Sim. N. S. 457.

Power to
do acts
merely
minis-
terial.

2. A power to do an act merely ministerial, and involving no personal discretion, may be delegated.

Lord St. Leonards (Pow. 180) says that it has been contended that a donee of a power cannot execute a deed of appointment by attorney: but the cases do not autho-

rize the position. They merely establish that the donee cannot delegate the confidence and discretion reposed in him to another. Where the deed of appointment is actually prepared, or the donee points out the precise appointment which he is desirous should be made, there no confidence, no discretion, is delegated. The appointment is in every respect an exercise of his own judgment; and there cannot be any reason why he should not be permitted to execute the deed of appointment by attorney. The contrary doctrine would lead to great inconvenience. Where, however, a particular mode of execution is required, it would be difficult to support an execution by attorney. This possible exception would appear to be met by 22 & 23 Vict. c. 35, s. 12 (*ante*, p. 110), so far as regards appointments by deed since 13th August, 1859.

Accordingly, a trustee with the legal estate may appoint an attorney merely to pass that legal estate, that being an act which involves no discretion. In *Attorney-General v. Scott*, 1 Ves. sen. 413, 415, twenty-five trustees had power to elect a clergyman: the Lord Chancellor said that they could not make proxies to *vote*: but if the choice was regularly made, they might make them for the purpose of signing the presentations.

In *Offen v. Harman*, 29 L. J. Ch. 307, trustees had power to consent to the substitution of other estates for the settled estates: they were made parties to a deed for carrying out such substitution, and saw and approved of the draft thereof. The execution of such deed by one of them by attorney was held valid. This point is not noticed in the report of the case in 1 D. F. & J. 253, nor is it expressly mentioned in the judgment of the Court.

And a father may exercise the power given him by 12 Car. 2, c. 24, s. 8, of disposing by will of the custody of his child, by giving authority to a surviving guardian

Guardian-
ship of
infant.

to nominate a person in the place of one who has died.
(In the *Goods of Parnell*, L. R. 2 P. & D. 379.)

Powers
equivalent
to owner-
ship.

3. The maxim *delegatus non potest delegare* does not apply to the case of a general power equivalent to absolute ownership.

If a man has a power of sale as absolute owner of the land, he may sell by attorney. *Combe's Case*, 9 Rep. 75. It is clear that when a person has an absolute power of appointment, he may appoint to certain persons or classes of persons in such shares as another person shall nominate. *White v. Wilson*, 1 Drew. 304. So, where an estate stands limited to such uses as A. shall appoint, an appointment by A. to such uses as B. shall appoint will be valid and effectual to pass the legal estate. (Sug. Pow. 195.)

Powers of
executors
over per-
sonalty.

Hence, as an executor is regarded, both at law and in equity, as the absolute owner of the testator's personal property, it has been held that an executrix may assign and give a valid power of attorney to collect debts due to the testator. *Earl Vane v. Rigden*, 5 Ch. 663.

In *Russell v. Plaice*, 18 Beav. 21, the Master of the Rolls held that a mortgage of leaseholds by an executor or administrator might well contain a valid power of sale—such a power is not to be considered as the delegation of a power entrusted to the executor, but as the creation of a new power to sell, not for the benefit of the persons interested in the testator's estate, but for the benefit of the person interested in the mortgage, that is, a power to render the mortgage effectual. The right to create this power is incidental to the authority of the executor to mortgage. This may be considered as overruling *Sanders v. Richards*, 2 Coll. 568.

In *Cruikshank v. Duffin*, 13 Eq. 555, an executor borrowed money for executorship purposes from a building society, and gave a mortgage of his testator's leaseholds with a power of sale and the usual incidents of a building society mortgage; it was held that a good title could be made by the mortgagees under this power.

4. It is perhaps doubtful whether a power to raise money by mortgage authorizes the donee to give a mortgage with a power of sale: but the balance of authority and convenience is in favour of the insertion of the power of sale. In the absence of any expression of a contrary intention, it may be fairly said that the creator of the power meant that the mortgage which he authorized should contain all usual and necessary powers: amongst these a power of sale is most important: the objection that the power of sale in the mortgage is a delegated authority is thus answered, for it comes, not from the donee, but from the donor, of the power to mortgage. However, in *Clarke v. Royal Panopticon*, 4 Drew. 26, the council of a company were authorized by a general meeting to raise money by mortgage: the articles of association directed that money should not be raised by sale or mortgage without the authority of a general meeting. V.-C. Kindersley held that the council had no power to give a mortgage containing a power of sale. He said that, although a special power to sell might authorize a mortgage, yet a power to mortgage does not comprise a power to give authority to sell; and that if a special power, involving an exercise of personal judgment is given to trustees, it is not competent to them to delegate that power: and he said that if a power to mortgage comprised as an incident, a power to give authority to sell, then it would follow that a trustee, who has a power to mortgage, has a power to sell, or, at least, can delegate to another a power to sell. He further said that in 1857

Does a power to mortgage authorise a mortgage containing a power of sale?

it was by no means the universal practice to treat a power of sale as a necessary incident to a mortgage, but he admitted that it was much more usual then than it was thirty or forty years before. And see *Drake v. Whitmore*, 19 L. T. Ch. 243, where V.-C. Parker in 1850 declined to permit the insertion of a power of sale in a mortgage-deed to raise money ordered to be raised by the Court.

But although perhaps a power of sale is not so necessary an incident to a mortgage as to make it a breach of trust in a trustee (*Farrar v. Barraclough*, 2 Sm. & G. 231), or dereliction of duty in an attorney (*Bailey v. Abraham*, 14 L. T. Q. B. 219), to take a mortgage without such a power, yet a power of sale in default of payment is now "regularly made a part of every mortgage, and, as such, is inserted by the draftsman without special instructions." (Davidson, ii. 591, 613.) It is moreover for the mortgagor's benefit: for it increases the security, and therefore makes the loan more readily obtainable. It is now given to the mortgagee by statute (23 & 24 Vict. c. 145), and at no time could the mortgagor have escaped foreclosure (or sale in lieu thereof, 15 & 16 Vict. c. 86, s. 48) in case of default in payment.

The later authorities are all in favour of the insertion of a power of sale. *In re Chawner's Trusts*, 8 Eq. 569, V.-C. Malins declined to follow the authority of *Clarke v. Royal Panopticon*. In the case before him, a testator devised an estate to trustees, and directed them to raise a sum of money by mortgage of the estate in such manner as they should think fit. The Vice-Chancellor was of opinion that the trustees were authorized to give a power of sale in their mortgage, that such a power is a necessary incident to a mortgage, and that when a testator says that money is to be raised by mortgage, he means it to be raised in the way in which money is ordinarily raised by mortgage, and therefore that the

mortgage might contain what mortgages in general do contain, a power of sale.

In *Cook v. Dawson*, 29 Beav. 123, the Master of the Rolls in holding that a power to mortgage real estate did not authorize a direct sale, said (p. 128), "It is true that a power to mortgage includes a power to give to a mortgagee all such remedies as are proper to be given to him so as to mortgage the estate on the best terms, and authorizes giving to the mortgagee a power of sale." And in *Bridges v. Longman*, 24 Beav. 27, where a settlement empowered trustees to raise money by sale or mortgage, he held that no objection could be taken before him that the power of mortgaging was executed by means of a mortgage which contained a power of sale, "because such a power is incident to the power to mortgage, unless expressly excluded." And see *Bennett v. Wyndham*, 23 B. 521.

In *Selby v. Cooling*, 23 B. 418, the same Judge authorized the insertion of a power of sale in a mortgage of an infant's real estate made by order of the Court, with the qualification "if the mortgagee should require it."

But where a purchase deed is set aside by the Court on the ground of the fiduciary relation between the parties, and ordered to stand as a mere security for the money advanced, the Court will not import into the transaction a power of sale; for the property might thereby be lost by a sale from the first purchaser to a second. *Pearson v. Benson*, 28 B. 598.

5. The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 15, subsect. 4), enacts that the property of the bankrupt divisible among his creditors shall comprise—

The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bank-

Where purchase deed is ordered to stand as a mortgage only.

Involuntary delegation. Bankruptcy.

ruptcy or during its continuance, except the right of nomination to a vacant ecclesiastical benefice. By s. 17, such property shall, on the appointment of a trustee, forthwith pass to and vest in the trustee appointed; and by s. 25, the trustee shall have power to exercise any powers, the capacity to exercise which is vested in him under the Act, and to execute all powers of attorney, deeds, and other instruments expedient or necessary for the purpose of carrying into effect the provisions of the Act.

Powers exerciseable by will only would not pass to the trustee: for such a power is purely personal: no other man can make my will. (Sug. Pow. 188; *Smith v. Wheeler*, Ventr. 128.)

Judgments.

By 1 & 2 Vict. c. 110, s. 13, it is provided, that a judgment entered up against any one shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including copyholds), over which he shall have at the time of entering up such judgment, or afterwards, any disposing power which he might without the assent of any other person exercise for his own benefit: and the creditor is to have the same remedies as if the debtor had power to charge the hereditaments, and had agreed to do so in writing, to the extent of the judgment debt and interest. And see 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112.

Beneficial powers of lunatics.

By 16 & 17 Vict. c. 70, s. 136, it is provided, that where a power is vested in a lunatic for his own benefit, or the consent of a lunatic is necessary to the exercise of a power, and such power of consent is in the nature of a beneficial interest in the lunatic, and it appears to the Lord Chancellor to be for the lunatic's benefit, and also to be expedient that the power should be exercised or the consent given (as the case may be), the committee of the estate may, in the name or on behalf of the lunatic, under an order of the Lord Chancellor, made on

the application of the committee of the estate, exercise the power or give the consent, as the case may be, in such manner as the order shall direct.

By s. 137 it is provided that where a power is vested in a lunatic in the character of a trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the Lord Chancellor to be fit and expedient that the power should be exercised or the consent given, as the case may be, the committee of the estate in the name or on behalf of the lunatic, under an order of the Lord Chancellor, made upon the application of any person interested in the exercise of the power, may exercise the power or give the consent, as the case may be, in such manner as the order shall direct. As to powers of leasing, see s. 133 of the Act, and *post*, "Powers of Leasing;" and as to appointments of new trustees, s. 138 of the Act, and *post*, "Powers of appointing New Trustees."

Powers not for lunatic's own benefit.

6. The survivorship of powers may be conveniently considered in connection with the delegation of powers.

In considering questions of delegation and survivorship of powers, the distinction between powers and trusts must be borne in mind. A naked power to two will not survive without express words or necessary implication: the reason being, that where the testator has disposed of his property in one direction, subject to a power in two or more persons enabling them to divert it in another direction, the property will go as the testator has first directed, unless the person to whom he has given the power of controlling the disposition exercise that power: *i.e.*, the previous estate is not to be defeated unless the power be exercised *modo et formâ*. But if a testator gives his property, not to one party subject to a power in others, but to trustees upon special trusts, with a direction

Distinction between powers and trusts.

to carry his purposes into effect, it is the duty of the trustees to execute the trust: thus, if the direction be to raise a sum of money, the estate is thereby at once charged, and it becomes the duty of the trustees to raise the charge so created. If an estate be devised to A. and B. in trust to sell, and thereby raise such a sum, it is a novel argument that after A.'s death B. cannot sell the estate and execute the trust. *Lane v. Debenham*, 11 Ha. 192. And see an opinion of Mr. Hayes, Dart, V. & P. 4th ed. 557, n. And as to trusts, Lewin, 188, 437; *Cooke v. Crawford*, 13 Sim. 91; *Mortimer v. Ireland*, 11 Jur. 721, 6 Ha. 196; *Hall v. May*, 3 K. & J. 585; *Titley v. Wolstenholme*, 7 B. 425, Dart, V. & P. 554.

Mere powers as distinguished from trusts are strictly construed, and can only be exercised by the persons who are, either expressly or by reference, designated as donees of the power. (Dart, V. & P. 558.)

Power to
A. and B.
and their
heirs.

Thus a bare power to A. and B. *and their heirs* is exerciseable after the death of A. by B. and the heir of A. "It is to be considered as a tenancy in common. It is equivalent to saying, with consent of both while they live, but when one dies, that consent shall devolve upon his heir: the heir of the dead trustee shall consent as well as the surviving trustee. One may abuse the power. I will supply the loss of one by his heir: and the loss of both by the heirs of both." *Mansell v. Vaughan*, Wilm. 51.

Not exer-
ciseable by
the sur-
vivor alone.

Such a power cannot be exercised after the death of A. without the concurrence of his heir. In *Townsend v. Wilson*, 1 B. & Ald. 608, a power of sale was given to three trustees and their heirs; the trustees were mere trustees to preserve and had no estate in the land; the purchase-money was directed to be paid to the trustees or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor; and there was a power of appointment of new trustees. One

trustee died : it was held that the survivors alone could not sell.

In *Hall v. Dewes*, Jac. 189, Lord Eldon said that he did not agree with the decision in *Townsend v. Wilson*, but he followed it so far as to refuse to enforce specific performance against a purchaser in the case before him. The power there was contained in marriage articles : a settlement was afterwards made in pursuance of, but not in accordance with, the terms of such articles. The power of sale was with the consent of three trustees, their heirs, or assigns : receipts were to be given by the three trustees, or the survivor, his executors, or administrators, and there was a power of appointing new trustees. One trustee went abroad, and a new trustee was appointed in his place ; another died ; the survivor and the new trustee, without appointing another new trustee, and without the concurrence of the heir of the deceased trustee, attempted to sell. The Court refused to force the purchaser to take the title.

A discretionary legal power limited to A. *and his assigns* is exerciseable by the grantee, devisee, heir, or executor, as the case may be, of A. (*How v. Whitfield*, 1 Vent. 338, Sug. Pow. 180.)

Power to
A. and his
assigns.

In *Saloway v. Strawbridge*, 1 K. & J. 371, 1 D. M. & G. 594, a mortgage deed gave a power of sale to the mortgagee, his heirs, executors, administrators, and assigns, with a direction that the receipt of the same persons should be a good discharge. It was held that the administrator of the transferee of the mortgage, with the concurrence of a trustee to whom the heir of the mortgagee had conveyed the legal estate, could validly exercise the power.

A power of sale given to A., his executors or administrators, can be well executed by an administrator *durante minore ætate*. (*Monsell v. Armstrong*, 14 Eq. 423.)

To A., his
executors
or ad-
ministra-
tors.

Power
given to
persons
named.

7. The rules as to the survivorship of powers are not perhaps quite settled, but the following appear to be the results of the authorities :

A bare power, given to two or more by name, cannot be executed by the survivor.

This is not because there is anything in a power incompatible with its surviving, but if a man says he will trust two, the law will not say he shall trust one ; it is a joint confidence. It will be otherwise if the power be limited to the survivor ; that is saying that he will trust two as long as they live, and afterwards one of them. (*Mansell v. Mansell*, Wilm. 43.)

Where a naked power is vested in two or more *nominatim*, without any reference to an office in its nature liable to survivorship, as an executorship is, it without doubt would be a contradiction of the general rule to allow the power to survive. (Harg. note, Co. Litt. 113 a.)

In *Montefiore v. Brown*, 7 H. L. C. 241, it was held that a power of revocation to be exercised by A. and B. could not be exercised by the survivor of them. It will be the same if the power be merely to consent. In *Atwaters v. Birt*, Cro. Eliz. 856, there was a feoffment to uses, with a proviso that, on payment of 12*d.* and procuring the assent of the feoffees, the uses should cease. One of the feoffees died, and it was held that the power of assenting was not exerciseable by the survivors.

Protectors
of settle-
ments.

But the rule does not apply to the case of protectors of settlements under 3 & 4 Wm. 4, c. 74, s. 32. In *Bell v. Holtby*, 15 Eq. 178, two persons were appointed protectors and one died ; no provision was made for filling up a vacancy in the office. It was held that the surviving protector with the tenant in tail could effectually bar the entail.

8. If the power be given to several, not *nominatim* but as a class (*e.g.*, to “my sons”), it seems doubtful whether, after the death of one of the number, the survivors can sell. Lord St. Leonards states the rule to be, and it is perhaps the better opinion that it is this—

Power to several as a class.

Where the power is given to three or more generally, as to “my trustees,” “my sons,” &c., and not by their proper names, the authority will survive whilst the plural number remains. (Sug. Pow. 128, *sed qu.*)

In *Vincent v. Lee*, Cro. Eliz. 26, Co. Litt. 113 a, a testator devised his lands to A. in tail, and if A. died without issue, that his lands should be sold by his sons-in-law. He had five sons-in-law at his death. One of them died; then A. died, leaving issue a daughter, who died without issue; and then the four sons-in-law sold. This was held good. This case is hardly an authority for the rule to the extent above stated. The power of sale did not arise until the failure of A.’s issue, and it was not adjudged that, if one of the sons-in-law had died after such failure, a sale by the survivors would have been good. The reason of the decision was probably the same as in the case mentioned by Coke immediately before (113 a), viz., that the *land could not have been sold before*—*i.e.*, the power did not arise before, and the plural number remained. And considerable doubt is thrown on the correctness of the rule by the case of *Sykes v. Sheard*, 2 D. J. & S. 6. In that case a testator devised his real estate to trustees on trust to sell, and hold the proceeds on trusts for his children and their issue, subject to a proviso that no sale should be made without the consent of his sons and daughters. The testator left seven

Decision contrary to the rule above stated.

children, one of whom, a daughter, afterwards died, and her husband became absolutely entitled to her share. The trustees, with the consent of the surviving children and of the husband of the deceased daughter, put up the estate for sale. The Lord Justices held that, notwithstanding the case of *Vincent v. Lee*, the title was much too doubtful to be forced upon a purchaser. On the other hand, V.-C. Malins, in *Jefferys v. Marshall*, 19 W. R. 95, entirely dissented from the decision in *Sykes v. Sheard*.

9. The next rule is also doubtful; but it seems the better opinion that—

Powers annexed to an office.

Where a power is annexed to an office (*e.g.*, if it be given to executors,) all persons who fill the office can exercise the power; but if the power be given to persons named officially (*e.g.*, to my executors A. and B.), it is in each case a question of intention whether the power is given to the person or to the office—*sed qu.*

In *Brassey v. Chalmers*, 16 B. 233, the Master of the Rolls says that it is settled by repeated authorities that when a naked power is given to several persons it cannot be executed by the survivors. It is a power the execution of which is intrusted to several individual persons jointly, which can only be executed by them all, and if one of them should die, the authority will not survive. It is also equally settled, that if the power be annexed to the office, any persons who fill the office of executor will have also the power which is attached to that office. The chief difficulty arises in cases where the power is given to certain persons by name, and they are also appointed executors; and in these cases the proper distinction seems

to be, that it is incumbent on the Court to ascertain in such cases whether the power is given to the executor or to the person.

Mr. Hargrave (Co. Litt. 113 a) conjectures that where a power of selling is given to executors, or to persons *nominatim* in that character, a surviving executor may sell : for by the death of one executor the whole character of executor becomes vested in the survivor, and the power being annexed to the executors *ratione officii*, and the office itself surviving, the power annexed to it should also survive ; and he cites an opinion of C. J. Hale in favour of his view, and Kelw. 44, 2 Brownl. 194, where it is said that such a power given to executors passes to their executors and administrators. It is, however, doubtful if this latter statement is correct. (See *ante*, p. 68.)

In Jenk. Cent. p. 43, ca. 83, it is said that at Common Law, if a man devise that A. and B. shall sell his land and makes them executors, one cannot sell without the other, although the latter die. But it is otherwise if he devise that his executors sell, and afterwards names A. and B. to be his executors at the end of his will ; for the naming them by their proper names in the first instance shows personal confidence in A. and B. as private persons. And it seems, too, that if the devise be that A. and B., his executors, shall sell his lands and they be named executors at the end of the will, the survivor can sell ; for the power (the word in the original is "interest," but this must be a mistake, as it is clearly a power) is annexed to the office by this repetition.

In *Houell v. Barnes*, Cro. Car. 382, a man devised his lands to A. for life, and afterwards ordered the same to be sold by his executors thereunder named, and the moneys thereof coming to be divided among his nephews, and he appointed B. and C. executors. The two ques-

tions for the Court were, whether the said B. and C. had an interest or a power? and whether B. could sell after the death of C.? And it was resolved that B. and C. had a power, and that the surviving executor might sell.

In *Brassey v. Chalmers*, 4 D. M. & G. 535, 16 B. 231, a testator gave power to sell lands to his executors therein mentioned, with the approbation of his trustees for the time being, and he appointed A. and B. executors. The Master of the Rolls thought that the power was given to A. and B. individually, and not to them in their character of executors. The Lords Justices, however, did not concur in this view, but followed *Houell v. Barnes*. And see Sug. Pow. 128.

In *Byam v. Byam*, 19 B. 67, a tenant for life was authorised to withdraw a fund from settlement with the consent of the "undersigned trustees." The Master of the Rolls thought that the power was annexed to the office and not given to the persons named as trustees in their individual character, and accordingly might be exercised by the trustees for the time being, whoever they might be. And see *Bartley v. Bartley*, 3 Drew. 384.

Cases contrary to the last rule.

On the other hand, in a note to Dyer, 209, a 8, a case is stated, wherein A. devised that his executors should sell his lands: one died, and the others could not sell, by the opinion of Anderson, Windham, and Rhodes. This is, probably, the same case as *Lock v. Loggin*, 1 And. 145, where a testator devised lands to A. for life, with remainders over in tail; and for default of issue to be sold by the executors. The testator died; then one of the executors died; then the tenant in tail in remainder died without issue, and then A. died. It was held that the surviving executors could not sell. And see Co. Litt. 112 b.; Chance on Powers, 662 *et seq.*

In *Cole v. Wade*, 16 Ves. 27, it was held that where a power is of a kind that indicates a personal confidence,

it must *primâ facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others, to whom by legal transmission the same character may happen to belong. But in that case the power was of a very special nature (viz., of selecting which relations of the testator should share in his estate), and was given to the executors on the express ground of personal confidence.

And where lands are devised to trustees in fee with powers which in their execution require the exercise of judgment and discretion, and the trustees disclaim the devise, so that the legal estate descends on the heir-at-law, he cannot exercise the power, although he holds on the trusts of the will. Such trusts and powers are supposed to have been committed by the testator to the trustees he appoints by reason of his personal confidence in their discretion, and it would be wrong to permit them to be exercised by the heir-at-law, who may be a person unknown to the testator, or in whom he has no confidence at all. A trust which gives the trustee no other duty to discharge than simply to clothe the equitable ownership with the legal estate may, indeed, be performed by the heir. It does not follow that a trust may be performed or a trust power exercised by the heir-at-law, because it is obligatory on the trustees of the will. It depends on the question whether in the exercise anything has to be supplied by the judgment, knowledge, and discretion of the person acting in the exercise of such trust or power. (*Per* Lord Westbury, *Robson v. Flight*, 4 D. J. & S. 613. And as to *trusts* for sale, see *Austin v. Martin*, 29 B. 523, commented on in *Lewin on Trusts*, 5th ed. 347; *Welstead v. Colville*, 28 B. 537; *Dart*, V. & P., 4th ed., 555.)

Powers do not pass to heir when trustees disclaim.

Power
which
arises by
implication
survives.

10. If the power arises by implication, it attaches to the office, and may be exercised by the holder of the office for the time being.

In *Anon.* 2 Leon. 220, A. devised his lands to his wife for life, and if he should have no issue by her, then he willed that his lands should be sold after the death of his wife and the money distributed to three of his blood. He made his wife and B. executors and died. B. died and the wife sold. The sale was held good; although no persons were named, the executors were the persons to sell, and the power survived.

This decision seems untenable, however, on the grounds that the power did not arise until the death of the wife (*ante*, p. 120), and that the executors could not, under the circumstances, have been intended to sell (*ante*, p. 52).

In *Anon.* Dyer, 371, b. 3, a man devised all his lands to A., except his manor of R., which he appointed to pay his debts: and he made two executors and died, and one executor died. It was held that the survivor could sell. And see *Milward v. Moore*, Savile, 72; *Forbes v. Peacock*, 11 M. & W. 630; *Sabin v. Heape*, 27 B. 553.

CHAPTER XII.

POWERS IN THE NATURE OF TRUSTS.

<p>1. <i>Powers intermediate between trusts and powers</i> 377</p> <p style="padding-left: 2em;"><i>Gift to the objects of the power implied from the power</i> 379</p> <p>2. <i>Gift implied from gift over in default of objects</i> . 380</p> <p>3. <i>No gift implied if gift over be in default of appointment</i> 382</p> <p>4. <i>Implied gift arises, although donee of power has a discretion</i> 383</p> <p>5. <i>Period of vesting, when there is a direct gift to the objects</i> 384</p> <p>6. <i>Period of vesting, when</i></p>	<p style="padding-left: 2em;"><i>there is no direct gift to the objects</i> 386</p> <p>7. <i>Period for ascertaining the class</i> 387</p> <p>8. <i>The objects take equally</i> 389</p> <p style="padding-left: 2em;"><i>Court adopts any rule laid down by testator</i> 390</p> <p>9. <i>Requisites for the creation of a power in the nature of a trust</i> <i>ib.</i></p> <p>10. <i>Absolute gift followed by precatory words</i> 392</p> <p>11. <i>What is sufficient evidence of intention</i> 394</p> <p>12. <i>Uncertainty of subject</i> 397</p> <p style="padding-left: 2em;"><i>Trust for maintenance</i> 398</p> <p>13. <i>Uncertainty of object</i> 399</p>
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1. "WHERE there is a mere power of disposing and it is not executed, the Court cannot execute it (*ante*, p. 266); but wherever a trust is created and the execution of that trust fails by the death of the trustee or by accident, the Court will execute the trust. But there are not only a mere trust and a mere power, but there is also known to the Court a power which the party to whom it is given is intrusted and required to execute; and with regard to that species of power, the Court considers it as partaking so much of the nature and qualities of a trust that if the person who has that duty imposed on

Powers
which are
inter-
mediate
between
trusts and
powers.

him does not discharge it, the Court will to a certain extent discharge the duty in his room and place. The principle is that if the power is one which it is the duty of the donee to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power and has not a discretion whether he will exercise it or not. The Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it." (*Brown v. Higgs*, 8 Ves. 561; *Richardson v. Chapman*, 5 Bro. P. C. 400; *Pierson v. Garnet*, 2 Bro. C. C. 38, 226; *Maddison v. Andrews*, 1 Ves. sen. 57; *Harding v. Glyn*, 2 W. & T. L. C. 860.)

"Where there is a power of selection among certain objects, and an intention manifested that the objects should not be disappointed,—for instance, where there is a bequest to the testator's wife for life, and after her decease to be divided or distributed amongst such of his children as she should appoint,—as the right to exclude some does not prevent the class from taking in default of appointment, it would now be held, notwithstanding the decision in *Duke of Marlborough v. Lord Godolphin*, that the children take in default of appointment, either by implication or because the power is coupled with a trust." (*Salisbury v. Denton*, 3 K. & J. 535.)

In all these cases, although in terms no obligation was imposed on the donee to exercise the power, and although in some he had a discretion to select from the class the individuals to take, yet as the property was given to him generally with such a power, and his own interest was confined to his life by plain construction, an intention was collected that the interest beyond his own

life was to vest in the objects, and that he, having a sufficient estate for that purpose, and a power, was bound to give effect to that intention: and his neglect to exercise his discretion, or to execute his power amongst the objects—where none was to be excluded—was not permitted to operate to the detriment of his *cestuis que trust*: for such the objects of a power in the nature of a trust really are, although the person to whom the power is given has more than the authority of a common trustee. (Sug. Pow. 590.)

The rule may be thus stated:—

If there is a power to appoint among certain objects, but no gift to those objects, and no gift over in default of appointment, the Court will imply a gift to those objects equally, if the power be not exercised. (*Re White*, John. 656.)

Gift implied from the power.

“When there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the Court will carry into effect the general intention in favour of the class. When such an intention appears, the case arises, as stated by Lord Eldon in *Brown v. Higgs*, 8 Ves. 574, of the power being so given as to make it the duty of the donee to execute it: and in such case, the Court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit.” (*Burrough v. Philcox*, 5 M. & C. 92.) In *Re White*, John. 656, there was a bequest to trustees for A. for life, and if he should die childless, upon trust to apply the trust fund for the benefit of such of the tes-

tator's children or their issue as the trustees should think fit: there was no gift in default of appointment. No appointment was made, and A. survived the trustees and died childless. It was held that the children and remoter issue of the testator took in equal shares *per capita*.

The rule appears to be the same, whether the gift be to A. for life with power to dispose thereof among a class, or to A. absolutely, with words amounting to a precatory trust.

In *Walsh v. Wallinger*, 2 R. & M. 78, a testator bequeathed the residue of his estate to his wife for her own use and benefit, trusting that she would at his decease give and bequeath the same to their children in such manner as she should appoint. There was no gift in express terms to the children, nor any intention displayed that they were to take in default of appointment. It could only be inferred from the power itself who were to take in default of appointment, and it was held that the children who survived the wife took. And as to charities, see *Salisbury v. Denton*, 3 K. & J. 329; *Chamberlayne v. Brockett*, W. N. 1872, 135; *Lewis v. Allenby*, W. N. 1872, 55.

2. There are cases also which are distinct from those above mentioned, in which the objects of the power are held to be objects not of a trust, but of an implied gift from the words of the power or of the gift over: the distinction is not important, as the result is the same in both cases.

It is a rule that,

If there be a power of appointment among a class, but no gift to that class, and a gift over in default of objects of the power (not of appointment), there will be an implied gift to the objects of the power, if the power be not exercised.

Gift implied from the gift over being in default of objects of the power.

In *Witts v. Boddington*, cited 5 Ves. 503, there was a gift to the testator's wife for life, with a power of appointment among the children of their daughter: but if no children of the daughter should be alive at his wife's decease, he gave the property to other persons. There was held to be an implied gift to the objects of the power.

In *Butler v. Gray*, 5 Ch. 26, a testator gave his residuary estate to be equally divided among his children: he afterwards gave the dividends for the use of each of his children for their respective lives, and if they had children, then the principal to be at the disposal of the parent to such children, and in default of children, over. This was held to give the testator's children their respective shares for their lives, with power to appoint to their respective children, and part of such fund having been left unappointed by one of the testator's daughters, it was held to be divisible among her children equally. Lord Hatherley said that the daughter's interest was intended to be only a life interest with a power to appoint among her children, and in default of her having children (not in default of appointment), a gift over to the other members of her family. In that view of the case, therefore, if the power was not exercised, the children would be held to be direct objects of the original testator's bounty, and in default of appointment to take whatever had not been well appointed.

On the other hand, in *Re Jeffery*, 14 Eq. 136, a testator gave his residuary estate to trustees on trust for his daughter for life, and after her death amongst her children, grandchildren, or other issue, as she should by deed or will appoint: and in *default of appointment*, as she should by deed or will generally appoint, and in default of appointment under that power, to her nearest of kin, according to the statute. The daughter made a testamentary appointment under the general power, reciting,

as the fact was, that she had then no children. She afterwards had children, but died without revoking the appointment. It was held, first, that there was an implied gift to the objects of the first power; secondly, that if not, the appointment was conditional on there being no children, and they took as nearest of kin as in default of appointment. V.-C. Malins considered that "in default of appointment" meant "in default of children, and there being consequently no objects of appointment:" and further, that the recital of the fact that she had no children showed that she knew she could not appoint, and did not intend to appoint under her general power except in default of children, and the appointment having failed by reason of its being conditional on such want of children, those children took either by implication or as the next of kin in default of appointment. The latter would appear to be the true ground: "in default of appointment" can hardly be read as "in default of children" without disregarding the express words of the author of the power. The objects of the gift in default of appointment are entitled to claim that they shall not be deprived of the gift to them, except in the events specified by the author of the power. It is a rule that

No gift implied if the gift over be in default of appointment.

3. Where there is a gift over in default of appointment to the objects of the power or to other persons, the words of the power cannot operate to vest any estate in the objects of it by implication, if there be no appointment. (*Jenkins v. Quinchant*, 5 Ves. 596 n.)

In *Patteson v. Patteson*, 19 B. 638, a testator gave a fund to his wife for life, with power for her to appoint it by will among A., B., and C., and their respective chil-

dren, and in default of appointment he directed that the same, at his wife's death, should go amongst all the said children equally. No appointment having been made, it was held that the children alone took, by virtue of the gift over, to the exclusion of A., B., and C.

But a gift over, to take effect in an event which does not happen, has no operation, and therefore will not prevent the implied gift arising from the power itself. (*Kennedy v. Kingston*, 2 J. & W. 431.)

4. Although the donee of the power has a discretion and may exclude one class entirely, the implication of a gift will still arise, if there appear to be an intention to give the property to the objects.

Gift by implication, although the class to take is left to the donee's discretion.

In *Longmore v. Broom*, 5 Ves. 126, there was a bequest to executors in trust to pay among the testator's two brothers and his sister or their children in such shares, &c., as the executors should think fit. The Master of the Rolls considered that the executors had a discretion, and might say to whom the fund should be given, the parents or the children: but that discretion not having been exercised, the fund was to be equally distributed between them. And see *re White*, John. 656, *ante*, p. 379.

And it would seem to make no difference that events have rendered it impossible to exercise the discretion. In *Carthew v. Enraght*, 20 W. R. 743, a testator directed that after the death of his wife his trustees should pay and divide 1000*l.* between such ten of the children of A. as his trustees should think fit. At the death of the widow there were only six objects of the powers living. It was held that there was an implied gift to them, whatever their number might be.

But in *Jones v. Torin*, 6 Sim. 255, where a testator bequeathed 6000*l.* in trust for his daughter for life, and on her death "he gave the said 6000*l.* to the children or their descendants of T. F. in such proportions as his said

daughter should appoint," it was held that the descendants were mentioned merely as substitutes for the children. There was a direct gift with a power of selection.

In *Penny v. Turner*, 2 Ph. 498, a testator, after giving his mother a life interest, willed and devised that all his property should be divided amongst his three sisters A., B., and C., *or* their children, in such proportions as his mother should appoint. No appointment was made, and there was held to be a gift in default to the whole class of daughters and children equally, not on the ground that "*or*" was to be construed "*and*," but that it was referable only to the power given to the mother of selection from among the class.

5. Where the property is itself given to the objects, but their shares or interests are to be declared by a third person, they take by force of the original gift to them, if the power be not executed. Questions have frequently arisen as to the period at which such gifts vest; for it is well settled that the existence of a power of appointment does not prevent the vesting of the property until and in default of the execution of the power. (*Doe v. Martin*, 4 T. R. 39.)

Period of vesting when there is a direct gift to a class.

If the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and what manner the members of that class shall take, the property vests until the power is exercised in all the members of the class, and they will all take in default of appointment. (*Lambert v. Thwaites*, 2 Eq. 151; *Bradley v. Cartwright*, L. R. 2 C. P. 511.)

In *Casterton v. Sutherland*, 9 Ves. 445, there was a devise to the testator's wife for life, and after her death "unto and amongst all and every our children in such

manner and in such proportion as my said wife shall either in her lifetime or by her last will appoint." There were five children, all of whom died before the wife, and there was no execution of the power. Sir W. Grant decided that it was a tenancy in common among all the children, subject to the power of appointment. The gift was direct to the children, and the power of appointment was exerciseable by deed as well as by will.

If there be a direct gift to the class, the mere fact that the power, the exercise of which may defeat that gift, is exerciseable by will only, is not enough to postpone the period of vesting, so as to make the direct gift available only for those of the class to whom the donee might have effectually appointed.

Power exerciseable by will only.

In *Brown v. Pocock*, 6 Sim. 257, there was (in effect) a bequest to A. of 2*l.* per week for life, with a direction that a sum should be set apart to answer those weekly payments, and after the death of A. there was a power to A. to leave the sum to and for the benefit of his wife and children in such manner as he should by will give and bequeath the same. There were four children of A. living at the death of the testatrix, of whom one died; and two other children were born afterwards. The wife died before the donee of the power. There was no valid appointment under the power, and the question was, to whom was the fund to go in default of appointment? It is to be observed that there was no direct gift to the wife and children, and only a power to A. to appoint by *will*. But it was held that the wife and children took in default of appointment as joint tenants, and therefore the surviving children were entitled to the fund. The decision was clearly founded on the circumstance that the power was to be exercised, not merely for the benefit of an indefinite class of children, but also for the benefit of the wife, a living and defined individual, who was an object of the testatrix's bounty, and therefore it

stood upon the same footing as if there had been a direct gift to the wife and children, in such manner as A. should by will appoint; and so it was a vested interest in the wife and children, subject to being divested by the execution of the power. (2 Eq, 157.)

Vested interest can only be divested by appointment.

And where there is an interest vested in the objects entitled in default of appointment, such interest can only be divested by a valid execution of the power of appointment; and if there be no such execution, then all the objects who attained vested interests, whether alive or dead at the death of the donee of the power, will take. (*Vanderzee v. Aclom*, 4 Ves. 771, 787.)

Period of vesting, when there is no direct gift.

6. If the instrument does not contain a gift of the property to any class, but only a power to a third person to give it as he may think fit among the members of that class, those only can take under the implied gift in default of appointment who might have taken under an exercise of the power. In that case, the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might have given it. (*Lambert v. Thwaites*, 2 Eq. 151.)

In *Kennedy v. Kingston*, 2 J. & W. 481, there was a bequest of 500*l.* to A. for life, and at her decease to divide it in portions, as she should choose, among her children. She had four children, one of whom died; and then when three were surviving, she made a will giving the fund in certain proportions to those three. Afterwards one of those three died before her. It was held that the appointment to the three was perfectly good, and that the lapsed share would go to the two who survived; and for this reason:

there was no direct gift by the testator to the children; the fund was given to her for her life, with a power at her decease to divide it as she liked among her children. That she could only do by her will; and of course none but those who survived her could take under her will; and therefore those only who survived her must be presumed to have been intended by the original testator to take in default of appointment. (2 Eq. 156.) And see *Walsh v. Wallinger*, 2 R. & M. 78.

7. The period for ascertaining the class to take will, it seems, also vary, according as the testator has or has not given the donee of the power or some other person a life interest in the trust property.

If the donee has a life interest, the persons entitled in default of appointment are such of the objects of the power as are living at the death of the donee, not of the testator, whether the power be one of selection or of distribution merely. (*Finch v. Hollingworth*, 21 B. 112.) But it seems that if there is a life estate given to a person other than the donee, the death of the longest liver of such life tenant and the donee of the power will be the period for ascertaining the class. In *Re White*, John. 656, there was a bequest to trustees for A. for life, and if he should die childless, on trust to apply the sum for the benefit of such of the testator's children or their issue as the trustees should think fit. A. survived the donees of the power. V.-C. Wood said: "The next question is, at what time the class is to be ascertained. The latest period which can be suggested is the death of the tenant for life. . . . In a case where the donee of the power survives the tenant for life, there would be a possible ground for arguing that the class must be kept in suspense long enough to let in all who might be born while the power was in existence. But here, the latest period that can be fixed is the death of the tenant for

Period for ascertaining the members of the class to take in default of appointment.

life. Then the question arises, whether children who predeceased the tenant for life are entitled to share. The words of this will clearly point to a personal enjoyment by the objects of the power at the death of the tenant for life; there is therefore strong reason for holding on the tenor of this particular will, if not on general principle, that none of those who predeceased the tenant for life could share in the benefits of an appointment under this power. There might be a question how far this, being an implied gift to all the objects of the power, ought to be considered as creating vested interests in them. This would apply forcibly to a case like *Penny v. Turner*, 2 Ph. 493, where the objects are named; but here the benefit is bestowed upon a class, and the question is at what time that class ought to be ascertained. I think that the right period is the death of the tenant for life; and the fund must therefore be divided among such of the children and grandchildren as were living at the death of the tenant for life in equal shares *per capita*." And see *Carthew v. Enraght*, 20 W. R. 743.

Where the distribution or selection is not suspended by any preceding life estate, it seems that the persons who answered the description and formed members of the class at the time when the instrument creating the power came into effect, will take, (*Cole v. Wade*, 16 Ves. 27.) Lord St. Leonards, however, says (Pow. 662), that the point does not seem to have arisen in the case, as the same persons appear to have been the next of kin at the time of the testator's death and when the decree was pronounced, which was after the power had ceased. But see 19 Ves. 426. And in *Longmore v. Brown*, 7 Ves. 124, there was a bequest to executors on trust to pay unto and amongst the testator's two brothers and sister or their children as the executors should think fit; and it

was held that the fund vested at the testator's death, and the power not having been exercised, after-born children could not take.

If the power is such as to allow the whole fee or interest to be appointed, the gift in default, whether it be express or implied, cannot be considered to be less than what might have been appointed by the exercise of the power: (*Crozier v. Crozier*, 3 Dr. & War. 373.)

Extent of
gift in de-
fault.

8. In considering powers in the nature of trusts, the Court to some extent adopts its principles as to trusts, and if the donee fails to execute the power, will execute it for him. (*Brown v. Higgs*, 8 Ves. 573.) Whether it be considered that the objects of the power take by such execution by the Court, or by force of an implied gift, the effect is the same, and the same rules apply. Accordingly, as the implied gift is to the objects equally, so,

In general, the Court goes by the rule that equality is equity, and gives the trust estate to the objects of the power equally. (*Doyley v. Attorney-General*, 4 Vin. Abr. 485.)

The objects
take
equally.

In *Salisbury v. Denton*, 3 K. & J. 329, there was a bequest of a fund to be at the disposal of the testator's widow by her will, therewith to apply a part to the foundation of a charity school or such other charitable endowment for the benefit of the poor of O. as she might prefer and under such restrictions as she might prescribe, and the remainder to be at her disposal among the testator's relatives as she might direct. V.-C. Wood said: "The case of *Doyley v. Attorney-General* was very similar to the present. There the property in question was bequeathed in trust for certain purposes, and, subject thereto, the trustees and the survivor of them and the heirs and executors of such survivor were to dispose of it to such

of his relations of his mother's side who were most deserving, and in such manner as they thought fit, and for such charitable uses and purposes as they should also think most proper and convenient: and the Master of the Rolls directed that half of the estate should go to the testator's relatives on the mother's side and the other half to charitable uses, the known rule that equality is equity being, as he said, the best measure to go by. It appears to me that there is no possibility of distinguishing that case from the present; for there can be no substantial difference between a direction to dispose of property to such relations and for such charitable purposes as the trustees should think most proper, and a direction like the present to apply a *part* to such charitable purposes and the *remainder* among relatives with a like discretion."

The Court will adopt any rule laid down by the author of the power.

But if a rule has been laid down for the guidance of the donees of the power, the Court will act upon it in the same manner as the donees might have done. (*Gower v. Mainwaring*, 2 Ves. sen. 87.) "Where trustees have power to distribute generally, without any object pointed out or rule laid down, the Court interposes not (unless in case of a charity, which is different, the Court exercising a discretion as having the general government and regulation of charity). But here is a rule laid down. The trustees are to judge on the necessity and occasions of the family; the Court can judge of such necessity of the family. That is a judgment to be made on facts existing, so that the Court can make the judgment as well as the trustees." (*Ibid.*) And see *Attorney-General v. Price*, 17 Ves. 371; *Mahon v. Savage*, 1 S. & L. 111; *Hewett v. Hewett*, 2 Ed. 332.

Requisites for the creation of a power in the nature of a trust.

9. It remains to consider what words will amount to an absolute, unfettered gift; and what to a power in the nature of a trust for the benefit of others.

The Courts are not any longer anxious and astute to educe a binding trust from vague and ambiguous expressions: they endeavour to take words in their plain sense, do not express from them occult meanings unknown to the persons who employed them, and decline to manufacture dispositions for testators which they have not chosen to make for themselves. (Ir. R. 5 Eq. 375.) The law as to the creation of precatory trusts is thus stated by Lord Langdale:

When property is given absolutely to any person, and the same person is by the giver, who has power to command, recommended, or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust. First, if the words are so used that, upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and, thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain. (*Knight v. Knight*, 3 B. 143, 11 Cl. & F. 513.)

“If a testator gives 1000*l.* to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum or any certain part of it to C. D., it is considered that C. D. is an object of the testator’s bounty, and A. B. is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish.” (*Ibid.*)

There appears to be a fourth requisite—viz., the

manner in which the trust is to be performed must be certain. This perhaps belongs, partly to the uncertainty of the subject, and partly to the uncertainty of the object, and may be reduced to either the one or the other of them. (*Reeves v. Baker*, 18 B. 379.)

Intention
of the
testator.

10. It is often difficult to determine whether a testator who has first made an absolute gift, and then added words which would amount to a precatory trust, intends the donee to take absolutely or not.

Absolute
gift
followed
by precatory
words.

Lord St. Leonards (Prop. H. of L. 375) says that the law as to the operation of words of recommendation, confidence, request, or the like, attached to an absolute gift has in late times varied from the earlier authorities. In nearly every recent case, the gift has been held to be uncontrolled by the request or recommendation made or confidence expressed. This undoubtedly simplifies the law, and it is not an unwholesome rule that if a testator really mean his recommendation to be imperative, he should express his intention in a mandatory form: but this conclusion was not arrived at without a struggle. It may be doubted whether the recent cases have borne out this dictum: it is in each case a question of intention, but it seems that the word "absolutely," or a general gift to A., his heirs and assigns, or executors and administrators, would not necessarily prevent a precatory trust from being raised by apt words: for "absolutely" may mean either unlimited in point of estate, or unfettered in respect of condition or trust (*Meredith v. Heneage*, 1 Sim. 542); and if there is an express contradiction between two clauses in a will, it is well settled that the second must prevail over the first.

Precatory
trust
created.

In *Bernard v. Minshull*, John. 276, a testatrix gave her husband 13,000*l.* *absolutely*, but requested him, after reserving for his own absolute use and benefit 2000*l.*, part of that sum, and applying all the interest to his

own sole use and benefit during his life, to make such a disposition of the remainder as would effect her wishes often expressed to him. Under this gift, the husband could not take more than 2000*l.* for his own use: but it is to be observed that “absolutely” is contrasted with “his own absolute use and benefit.” And see *Irvine v. Sullivan*, 8 Eq. 673.

In *Gully v. Cregoe*, 24 B. 185, there was a gift of residue to the testator’s wife for life, *for her own sole use and benefit for ever*, the testator feeling assured and having every confidence that she would dispose of the same equitably amongst her two daughters and their children. It was held that she took a life interest only, with a power of appointment. And a similar decision was arrived at in *Ware v. Mallard*, 21 L. J. (Ch.) 355, 16 Jur. 492, where the gift was to the testator’s wife, *her heirs, executors, administrators, and assigns, to and for her sole use and benefit*, in full confidence that she would in every respect appropriately apply the same for the benefit of their children. These cases were followed by V.-C. Hall in *Curnick v. Tucker*, 17 Eq. 320, where a testator appointed his wife sole executrix, and gave her all his property *for her sole use and benefit*, in the full confidence that she would dispose of it among their children. And see *Hart v. Tribe*, 18 B. 215; *Shovelton v. Shovelton*, 32 B. 143; *Palmer v. Simmons*, 2 Drew. 221; *Green v. Marsden*, 1 Drew. 646.

On the other hand, in *Webb v. Wools*, 2 Sim. N. S. 267, the gift was to the wife, her executors, administrators, and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her that she should dispose of the same to and for the joint benefit of herself and the testator’s children. The Vice-Chancellor thought that the testator’s expressions of trust and confidence did not create a trust; but that, being

Precatory
trust not
created.

in the same sentence in which he made an absolute gift to her, they were stated only by way of expressing his reasons for the gift. And see *Thorp v. Owen*, 2 Ha. 607; *Winch v. Brutton*, 14 Sim. 379.

In *Mackett v. Mackett*, 14 Eq. 49, the testator devised all the residue of his estate to S. M., a married woman, her heirs, and assigns for ever; but upon trust, as to all the freeholds, as in his will declared; and as to the personalty, “to and for her own proper use and benefit for ever,” separately from her husband, “and the proceeds to be applied by her in the bringing up and maintenance of all her children. This was held an absolute interest. And see *Lambe v. Eames*, 6 Ch. 597.

In *Reid v. Atkinson*, Ir. R. 5 Ch. 162, 373, the testator gave his property to his wife for her life, “with full power to dispose of all the aforesaid property both real and personal, as she may judge best and wisest, relying with implicit confidence on her discretion, and well satisfied in my mind that she will make such distribution or disposal of it as will perfectly accord with my wishes on that subject, with all of which she is thoroughly acquainted.” There was some evidence of the testator having communicated some wishes to his wife, but none as to what they were. It was held that the terms of the gift to the wife did not create a precatory trust. And cf. *Kerr v. Baroness Clinton*, 8 Eq. 462; and *ante*, p. 78 *et seq.*

What is
sufficient
evidence of
intention.

11. If there be no words indicative of an intention to give an absolute beneficial ownership, the case is simpler; but in order to create a precatory trust the requirements of the rule stated in s. 8 must be fulfilled. Whenever a person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire is to be controlled by the party, and that he shall have an

option to defeat it. (*Malim v. Keighley*, 2 Ves. jun. 335.)

The question always is whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion. (*Williams v. Williams*, 1 Sim. N. S. 358, 368.)

The following expressions have been held to create precatory trusts:—

In *Ford v. Fowler*, 3 B. 146, a testator gave 10,000*l.* to A. B., and “recommended to her and her husband” to settle the said sum, together with such sum of money of his own as the daughter’s husband should choose, for the benefit of his said daughter and her children. The Master of the Rolls considered the word “recommend,” as there employed, was imperative; and that the fact that the testator had recommended that something of the husband’s should be settled also did not take away the certainty of the amount of the fund over which the testator had power. So, too, *Cholmondely v. Cholmondely*, 14 Sim. 590. Recommend.
mend.

On the other hand, in *Johnston v. Rowlands*, 2 De G. & Sm. 356, the testator gave 2000*l.* to his wife, to be disposed of by her will in such way as she should think proper; “but I recommend her to dispose of one-half thereof to her own relations and the other half among such of my relations as she shall think proper.” This was held not to create a trust, the Vice-Chancellor saying that although the word “recommend” might amount to a command in a particular instrument, and create a binding trust, yet that it was susceptible of a different interpretation—of an interpretation consistent with the

legal and equitable power of the person recommended, to depart from the recommendation. It must depend on the language of each particular instrument in which of the two senses the word ought to be considered as used in the particular case.

**Not doubt-
ing.** In *Parsons v. Baker*, 18 Ves. 476, there was a devise to A., "not doubting, in case he should have no child, but that he will dispose and give" the devised estate to the female descendants of B. And see *Massey v. Sherman*, Amb. 520.

Desire. In *Cruwys v. Colman*, 9 Ves. 319, "it is my absolute desire that my sister bequeaths at her own death to those of her own family what she has in her power to dispose of that was mine, provided they behave well to her."

Trusting. In *Baker v. Mosley*, 12 Jur. 740, "trusting that he will preserve" the stock bequeathed to him, so that after his decease it may go and be equally divided among his four children.

Confidence. In *Wright v. Atkyns*, 17 Ves. 255, "in the fullest confidence that after her decease she will devise the property" given her by the will to the testator's family.

Hoping. As to the word "hoping," see *Harland v. Trigg*, 1 Bro. C. C. 142.

**Well
knowing.** In *Briggs v. Penny*, 1 Mac. & G. 546, "well knowing that she will make a good use and dispose in accordance with my views and wishes" of the property given to her.

In *Greene v. Greene*, Ir. R. 3 Eq. 629, however, a gift of all the testator's property to his wife, "well knowing her sense of justice and love to her family, and feeling perfect confidence that she will manage same to the best advantage for the benefit of her children," was held not to create a precatory trust.

Entreat. In *Prevost v. Clarke*, 2 Mad. 548, "convinced of the high sense of honour, the probity and affection of my son-in-law E. C., I entreat him, should he not be blessed

with children by my daughter, and survive, that he will leave at his decease to my children and grandchildren the share of my property I have bestowed upon him." This was held to create a trust.

So, too, in *Parker v. Bolton*, 5 L. J. (Ch.) 98: "I give Advise, to A. all my real and personal property, and after my death do advise him to settle it upon himself and his issue male by his present wife, and for want of such issue on E. and his issue male."

12. One of the requisites stated in the rule in s. 8 Uncertainty of subject, was that the subject-matter must be certain. If, therefore, there be a gift by will, followed by apt precatory words, desiring that the donee will "leave the bulk" of the property given to persons named, no valid precatory trust will be created. (*Palmer v. Simmonds*, 2 Drew. 281.) So, a request that the legatee will give and bequeath "what should be remaining," or "what shall be left," to such members of her own and his family as the legatee should think proper, is too indefinite. (*Green v. Marsden*, 1 Drew. 647; *Wynne v. Hawkins*, 1 Bro. C. C. 179; *Lechmere v. Lavie*, 2 M. & K. 197.)

But if the terms of the will, taken as a whole, show that the request extends to all the property given by the will, a valid trust will be created. (*Howard v. West*, 1 S. & S. 387.)

But a request that the donee of a life interest will leave "what money or property she might have saved from the yearly income thereinbefore given to her," is too indefinite to create a trust. *Cowman v. Harrison*, 10 Ha. 234. And see *Sale v. Moore*, 1 Sim. 534; *Bardswell v. Bardswell*, 9 Sim. 319.

It seems, however, that a valid precatory trust may in some instances be created, although the amount of interest to be given to the objects is left undefined. In *Crockett v. Crockett*, 2 Ph. 553, there was a gift to A. to Trust, although the amount of interest is undefined.

be disposed of for the benefit of herself and her children, and it was held that the children had some interest, but it was not declared what that interest was. And see *Woods v. Woods*, 1 M. & Cr. 401; *Godfrey v. Godfrey*, 11 W. R. 554; *Constable v. Bull*, 3 De G. & Sm. 411.

But in *Lambe v. Eames*, 6 Ch. 597, where the words were similar to those in *Crockett v. Crockett*, the Lords Justices thought that there was no sufficient trust declared, but that if there was it had been fairly executed,

Trust for
mainten-
ance.

But a trust for the support and maintenance of an adult or infant is not too indefinite. "Whatever difficulties might originally have been supposed to exist in the way of a Court of Equity enforcing a trust, the extent of which was unascertained, the cases appear clearly to decide that a Court of Equity can measure the extent of interest which an adult, as well as an infant, takes under a trust for his support, maintenance, advancement, provision, or other like indefinite expression, applicable to a fund larger confessedly than the person entitled to the support, maintenance, or advancement can claim, and some interest in which is given to another person." (*Thorp v. Owen*, 2 Ha. 610, and cases there cited by V.-C. Wigram.) And where a testator gave his real and personal estate to his wife for life, with remainder to an infant great-nephew for life, a statement in the will that it was his particular wish and request that his wife and the infant's grandfather would superintend and take care of the infant's education, so as to fit him for any respectable profession or employment, was held under the circumstances and upon the effect of the whole instrument to charge the maintenance and education of the infant upon the interest taken by the testator's widow, although the grandfather, who was joined with the wife, took nothing under the will. (*Foley v. Parry*, 2 M. & K. 138.)

13. Another of the requisites mentioned in the rule stated in s. 8, was that the objects must be certain. It will be seen how a power to appoint among the "family" of any person is exerciseable (*post*, p. 417). But it seems that a gift to a man, "hoping that he will continue them in the family," is too indefinite in point of object, (*Harland v. Trigg*, 1 Bro. C. C. 142; *Williams v. Williams*, 1 Sim. N. S. 358.)

Uncertainty of objects,

In *Lambe v. Eames*, 6 Ch. 597, L. J. James seemed to think that a gift to be at the disposal of a person "for the benefit of herself and her family," was too indefinite for the Court to execute as a trust. He said that it was impossible to put any restriction on the meaning of the word, or to exclude any person who in ordinary parlance would be considered within the meaning. But see *Wright v. Atkyns*, 19 Ves. 299. And as to the word "relations," see *Reeves v. Baker*, 18 B. 372.

But although vagueness in the object will furnish reasons for holding that no trust was intended, yet this may be counterbalanced by other considerations, which show that a trust was intended, while at the same time such trust is not sufficiently certain and definite to be valid and effectual. It is not necessary, in order to exclude the legatee from a beneficial interest, that there should be a valid or effectual trust: it is only necessary that it should clearly appear that a trust was intended. (*Briggs v. Penny*, 3 Mac. & G. 546.) In that case the testatrix, after giving a legacy of 3000*l.* to A, and 3000*l.* in addition for the trouble she would have in acting as executrix, gave the residue of her estate to A., "well knowing that she will make a good use of it and dispose of it in a manner in accordance with my views and wishes." It was held that a trust was created, and therefore that A. could not take beneficially. There is no real substantial difference between such a case and the case of a testator

When trust is raised, although the object is undefined,

who gives all his property to A. on trust, but never declares that trust. In the latter case, there is the fact that a trust *nominatim* exists or was intended, but the objects are unknown; in the former, that views and wishes exist, and the bequest is made in confidence that they will be accomplished, but the objects are unknown. In both cases the legatee or devisee takes as a trustee for the next of kin or heir-at-law, unless the property can pass by a residuary gift. (See *Bernard v. Minshull*, John. 276; *Springett v. Jenings*, 6 Ch. 333.)

In *Briggs v. Penny*, it is to be observed that first absolute legacies were given to A., and that then the residue was also given to her: the Court, therefore, more readily concluded she was a trustee. In *Irvine v. Sullivan*, 8 Eq. 673, the testator devised his estate to three trustees on trust to sell, and directed them to hand over the net residue to D., and he gave and bequeathed the same to D. absolutely, "trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted." V.-C. James held that D. took beneficially, subject to the performance of the wishes communicated to her by the testator and set out in the bill. And see *White v. Cox*, 2 M. & Cr. 684; *Reid v. Atkinson*, Ir. R. 5 Eq. 373. And as to secret trusts, see *MacCormick v. Grogan*, L. R. 4 H. L. 82; *Norris v. Frazer*, 15 Eq. 318.

CHAPTER XIII.

OF THE OBJECTS OF PARTICULAR POWERS.

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1. In considering what persons are the objects of particular powers, it must be remembered that the donee of a limited power has no more dominion over the subject of the power than is given him by the terms of the power, and that the instrument creating the power is the only admissible evidence of the intention of the author of the power. The class cannot be made to contain objects other than those specified, because it is just or expedient, or because the author of the power would presumably have wished it, if the question had been laid before him, and that too, although the same person be author and donee of the power.

The objects
of limited
powers.

If the power be one of distribution merely, the objects thereof are determined by the same rules of construction as apply to gifts in similar terms, but without any power annexed. But if the power authorize selection, the donee may in some cases appoint to persons other than those who would be entitled under a simple gift to the same persons. (See *post*, s. 5.)

“Children”
means
legitimate
children,

2, It is a well-established rule that a gift to children means *primâ facie* legitimate children only. (Hawkins on Wills, p. 80,) Whether illegitimate children can take under that description must depend upon the language of the will itself, or upon that language as interpreted by surrounding circumstances; for in order to ascertain what the testator meant by particular words, it is proper for the Court, as far as possible, to put itself in the position of the testator, and from that position and the surrounding circumstances to ascertain and interpret the language of his will. (*Dorin v. Dorin*, 17 Eq. 468.) By analogy therefore to this rule, it may be stated that,

The objects of a power of appointment among children are *primâ facie* legitimate children only, unless it appears from the will or from circumstances that illegitimate children must have been intended.

In *Dorin v. Dorin*, 17 Eq. 463, a testator gave all his real and personal property to his wife A. B., in trust to apply the same to her own personal use during her life, with power to dispose of the same amongst their children by will, and if she made no will, the property was to be divided between his children by her. The testator had two illegitimate children by A. B., who were recognized by him and baptized as his children, and he had married her the day before he made his will. It was held that the two illegitimate children were the objects of the power, and that they would take under the gift in default of appointment.

Gifts and
appoint-
ments by
will.

But in order to enable such children to take, they must have acquired the reputation of being the offspring of their parent before the instrument containing the

power takes effect; for by the policy of the law, the paternity of illegitimate children cannot be inquired into; a gift by will by a testator or testatrix to one of his or her children by a particular person is good, if the child has acquired the reputation of being such child as described in the will before the death of the testator or testatrix. (*Re Goodwin*, 17 Eq. 346; *Occleston v. Fullalove*, 9 Ch. 147.) And in the same way, a power created by will to appoint among children may be exercised in favour of illegitimate children who have acquired the reputation of being children at the testator's death. (*Metham v. Duke of Devonshire*, 1 P. W. 529.)

But a provision by deed for the future issue of an illicit intercourse is bad, for it can only take effect as a gift on condition that there shall be unlawful intercourse resulting in the birth of offspring. Accordingly, inasmuch as a deed takes effect from its execution, in order that children may take under a limitation to them as such, they must be legitimate, or they must at the date of the deed have acquired the reputation of being children. (*Co. Litt.* 3 b.) And it would appear that if a man settled property by deed on himself for life, with remainder to such of the children as he might at his death be reputed to have by A., as he should by will appoint, and in default to B., the power of appointment as to after-born children would be bad, even though the deed might contain a general power of revocation and might have remained in the testator's custody without communication to any one till the time of his death. (per Lord Selborne, 9 Ch. 156.)

Gifts and appointments by deed.

A power created by will to appoint among the children of A. is *primâ facie* limited to the children in existence at the testator's

“Children” means such as are living at

testator's
death.

death, if there are any such. (*Paul v. Compton*,
8 Ves. 375.)

But it will be otherwise, if there is clear evidence of intention that all children are to be included: and if there were no children of A. living at the death of the testator, all his children whenever born would be objects of the power. (Cf. *Harris v. Lloyd*, T. & R. 310; and see Hawkins on Wills, pp. 68-71.)

Children
includes
child *en*
ventre sa
mère,

As a gift by will to children living at the death or born within the lifetime of the testator includes a child *en ventre sa mère* at the testator's death (*Trower v. Butts*, 1 S. & S. 181), so a power to appoint to children similarly described may be exercised in favour of a child *en ventre sa mère*. (Sug. Pow. 673.)

A power created by will to appoint among children without more would allow appointments to be made to the children of any marriage. (*Burrell v. Crutchley*, 15 Ves. 544.)¹ And the execution of a non-exclusive power in favour of the children of a first marriage is not void upon the face of it: for the appointor may not marry again, or if he do, may not have children. (*Green v. Green*, 2 J. & L. 541.)

Children
living at
death of
donee.

Where there was a bequest to A. for life and at her death to divide it among her children, it was held that the children who survived A. could alone take: there was no express gift in default of appointment, but the Court held that there was one by implication. The power could not have been executed by act *inter vivos*, and a valid appointment could be made only to such children as survived A. (*Kennedy v. Kingston*, 2 J. & D. 431; *Freeland v. Pearson*, 3 Eq. 658.)

In *Bielefield v. Record*, 2 Sim. 354, a testator gave a fund to trustees on trust for A. for life, and after her death to divide the same amongst all and every her child

or children living at her death, as she should appoint, and in default of appointment to *such* children equally : and there was a direction for maintenance until the share of each child became payable. A. appointed to her two children, one of whom died in her lifetime : the surviving child took the whole.

A gift to several persons *nominatim* without more is a gift in joint tenancy, and a gift to one on trust for himself and others bears the same construction : but there may be circumstances or expressions which will lead to a different conclusion. The circumstance, however, that the donees are the testator's wife and children is not of itself sufficient to prevent the application of the ordinary rule. (*Newill v. Newill*, 7 Ch. 253.) If, however, the gift be to A. on trust for himself and others as he shall appoint, it seems that the implication will be against a joint tenancy in default of appointment, and also against presuming A. to be an object of the power. In *Crockett v. Crockett*, 2 Ph. 553, a testator directed that all his property should be at the disposal of his wife for herself and her children. Lord Cottenham held that there was no joint tenancy, and seemed to incline to the opinion that a life estate to the widow with a power of appointment among the children was intended. He mentions an anonymous case in Dalison, 58, in which a man devised lands to his wife to dispose and employ them on herself or on his or her son or sons at her will and pleasure. It was held by C. J. Dyer and J J. Weston and Walsh that the wife took a fee simple, but that it was conditional, so that if the wife should alien to a stranger it would be a forfeiture. And cf. *Lambe v. Eames*, 6 Ch. 597 ; *Hanbury v. Tyrell*, 21 B. 322.

Wife and
children.

In *Re Sinclair*, Ir. R. 2 Eq. 45, a testator gave all his real and personal estate to his wife, her heirs, executors, and administrators in trust for her his said wife and the

Can a
parent be
at once
donee and
object of
the power ?

children of their marriage, in such shares and proportions and in such manner and form as the wife should by deed in her lifetime, or by will or codicil, appoint. The wife appointed to herself. In support of that appointment it was contended that the will contained a gift to the wife and children as joint tenants, with a superadded power to the wife to determine the quantity of the estate to herself and them by an appointment to be made by her. The Landed Estates Court held, however, that the true construction was a gift to the wife for life and to the children as she should appoint. The Judge inclined to the opinion that in all cases where a parent is at once the donee and an object of a power, such power could not be validly exercised by the donee in favour of herself, leaving only a nominal portion unappointed. But it seems that the real question would be in each case, can the testator be reasonably presumed to have intended the same person to be donee and object? If the intention were clearly expressed, there seems no reason why the donee should not appoint the whole to himself, if the power authorized an exclusive appointment, or with a nominal exception, if it did not authorize such an appointment.

Grand-
children
not objects
of power to
appoint
among
children.

3. Grandchildren are not, as a rule, objects of a power of appointment among children. (*Smith v. Lord Camelford*, 2 Ves. jun. 698.)

If therefore A. has power to appoint a fund among his children, to whom it is given in default of appointment, and one child die, A. can make no provision out of the fund for that child's issue: he cannot appoint to the child's executors or administrators (*Maddison v. Andrews*, 1 Ves. sen. 57); and any appointment previously

made by will would lapse and the Wills Act would afford no assistance. (*Griffith v. Gale*, 12 Sim. 327.) He can, however, allow the fund, or (if there be a provision for hotchpot) a proportionate part of it, to devolve as in default of appointment; in which case, if the deceased child's share was vested at the time of his death, his estate would benefit.

Lord Mansfield says that "children" may in some cases be extended to grandchildren and great grandchildren. (*Duke of Devonshire v. Cavendish*, 4 T. R. 744 n.); but the principles on which the dictum was founded are overruled. (Sug. Pow. 667.)

But grandchildren have been held to be objects of a power to appoint among children and their heirs, where it was clear that "heirs" was not a word of limitation. In *Fowler v. Cohn*, 21 B. 360, there was a devise to A. for life, and after his death to "such of his children and their, his, or her heirs for such estates, &c." as A. should appoint, and in default of appointment, to the children of A. and the several and respective heirs of the body of all and every such children. The Master of the Rolls considered that the word "heirs" was *designatio personarum*, and not a limitation of the estate. He thought that "heirs" must have been used to express the objects of the power, and not the interests they were to take; for otherwise it would be contradictory to give a power of appointing for *such estates*, and at the same time to direct that such appointment should be only in fee; and he thought that "heirs" meant "issue."

Children
and their
heirs.

But a power of appointing among children "subject to such regulations and directions with regard to the settling of the shares for their separate use, and with, under, and subject to such powers, provisoes, conditions, and other restrictions and limitations over (such limitations over being for the benefit of some or one of them),"

has been held not to authorize an appointment to grandchildren. (*Hewitt v. Dacre*, 2 Keen, 622.) The question in each case is, who are the objects pointed out by the author of the power? and accordingly, where a testator uses the words "children" and "grandchildren" indiscriminately, the Court, upon a slight indication of intention, extends the word beyond its strict limits. (*Hussey v. Dillon*, Amb. 602, 2 Eden. 196.)

Nephews
and nieces.

And a power to appoint among nephews and nieces does not authorize an appointment to great-nephews and great-nieces. (*Falkner v. Butler*, Amb. 513; *Waring v. Lee*, 8 B. 247.)

Issue.

4. The term "issue" *primâ facie* includes grandchildren; and a power to appoint among issue includes all issue, however remote, born in the lifetime of the donee of the power. (*Hockley v. Mawbey*, 1 Ves. jun. 143, 150.)

This generality may, however, be restrained by the design and tenor of the will; but the *onus probandi* is on the person desiring to restrict the generality. (*Leigh v. Norbury*, 13 Ves. 344.) An example of this is given by the rule in *Sibley v. Perry*, 7 Ves. 522, and *Pruen v. Osborne*, 11 Sim. 132, viz. that where the "parent" of "issue" is spoken of, the word "issue" is *primâ facie* restricted to mean children of that parent. And see *Lees v. Lees*, Ir. R. 5 Eq. 549.

Restricted
by subse-
quent ex-
pressions
in exe-
cutory in-
strument
or will.

The generality of the term may also be restricted by subsequent expressions in the instrument creating the power, if such instrument be executory, or be a will. In *Swift v. Swift*, 8 Sim. 168, a fund was settled by marriage articles (after successive life estates to the husband and wife) on the *issue* of the marriage, in case there should be

any living at the death of the husband and wife, in such manner, shares, and proportions as the husband should appoint, and for want of such appointment, to such *issue* share and share alike if more than one, and if but one, then the whole to go to *such only child*; and in case there should not be *any issue of the marriage* living at the death of the survivor of the husband and wife, then over. The Vice-Chancellor thought that the expression "and if but one," the whole to go to such only child, was demonstrative that the word "issue" meant children.

In that case, it is to be observed that the articles which created the power were executory. (*Ante*, p. 80.) See, too, *Edwards v. Edwards*, 12 B. 97, where the power was created by a will.

But if the power is contained in an executed instru-
 ment, the Court will not readily adopt a construction that will cut down the word "issue" to "children." In *Harrison v. Symons*, 14 W. R. 959, a settlement contained a power of appointment (in the events which happened) among all or any one or more of the brothers and sisters of A. who should be then living and the *issue* of any one or more of them who should be then dead leaving *issue*, in such shares, &c., as the said A. should by deed or will appoint. And the trust fund was limited in default of such appointment on trust for all the brothers and sisters who should be then living of A. and the *issue* of any of her brothers and sisters who should be then dead, the *issue* of any deceased brother or sister to take only such share as such brother or sister would have taken in case he or she had been then living, and the *children* of each deceased brother and sister, if more than one, to take in equal shares as tenants in common. V.-C. Wood held that the word "issue" was not to be restricted to children. (As to "issue" as a word of limitation, see *ante*, pp. 39-41; and as to appointments

*Secus, in
 executed
 instru-
 ment.*

to grandchildren which have been upheld as appointments to children and contemporaneous settlements by them; see *ante*, p. 336 *et seq.*)

Children
substituted
for parents.

5. It is a question of construction, to be decided according to the intention expressed in each case, whether a clause of substitution will make the substituted persons objects of the power, or merely entitle them to the benefit of the gift in default of appointment.

In *Fox v. Gregg*, Sug. Pow. 946, a testator gave his wife power to appoint among certain of her cousins "in such shares and proportions, manner, and form" as she should direct, and in default among them equally; and he provided that the children of such of his cousins as were then dead or as should die in his wife's lifetime should "stand in the place of their deceased parent or parents," and be entitled to such interest as the parents would have taken if they had survived the wife. The wife appointed in such a manner as to make it necessary to decide whether the power was a non-exclusive one and embraced the cousins living at the wife's death and the children of such as were then dead. It was held that it was; the substituted children were held to be objects as much of the power of appointment as of the gift in default.

In *Neatherway v. Fry*, Kay, 172, there was a bequest of residue in trust after the death of the testator's wife, to be divided amongst all his children, including A. if then living, in such manner and proportion as the testator's wife should by will appoint, provided that A.'s share should not be less than that of any of the other children; and in default of appointment, to be divided among all the testator's children living at his wife's death, including A. Moreover, if any child should happen to die before the testator's wife, leaving children, such children to have the *share* of their deceased parent. This power was held not to include the children's chil-

dren as objects: their interest was confined to the gift in default of appointment. See both these decisions observed on, Sug. Pow. 690.

6. Under a power of appointing portions to younger children as a class, an eldest son, whether such by birth or survivorship, can take no benefit: and that too, although an appointment has been made to him when he was actually a younger son, in consideration of marriage. (*Chadwick v. Doleman*, 2 Vern. 528.)

Power to
appoint
among
younger
children.

The same rule applies to a gift in default of appointment. "There is no sound distinction between construing that tacit condition of the continuance of the capacity of a younger child in the execution of the power of appointment, and in default thereof." (2 Ves. sen. 212.)

If a provision is made for the eldest son, and then other benefits are given to the younger children, the intention is taken to be that the person who becomes entitled to the provision intended for the eldest son shall not take any part of the benefits provided for the younger children, although, at the time when such interest vested, he was one of the younger children; and conversely, it is held that a younger child who becomes the eldest, although strictly excluded from sharing in the benefits provided for younger children, yet if he does not take the provision made for the eldest son, by reason of its having been disposed of by his elder brother in his lifetime, is not treated as the eldest son, so as to be excluded from taking his share with the younger children. (*Matthews v. Paul*, 3 Sw. 328.)

It is now well-established law, that where the bulk of an estate is settled in strict settlement, and by the same

settlement portions are provided for younger children, no child taking the bulk of the estate by virtue of the limitations in strict settlement shall take any benefit from the portions: and this is so, whether the settlement does or does not contain an express provision to exclude him from a share in such portions. *Macoubrey v. Jones*, 2 K. & J. 684; *Davies v. Huguenin*, 2 H. & M. 730.

It depends on the intention of the settlor or testator in each case; thus the fact of the eldest son being excluded by name would be material (*Wood v. Wood*, 4 Eq. 48); but the rule is the same whether the property be real or personal. (*Re Bayley*, 6 Ch. 590.)

In *Chadwick v. Doleman*, 2 Vern. 528, A. was tenant for life, with remainder to trustees to raise 4000*l.* for his younger children as he should appoint, with remainder to the first and other sons in tail. The father irrevocably appointed 2600*l.* to the second son. The eldest son died six years after: B. thereupon became eldest son, and A. made another appointment of the 2600*l.* It was held that the first appointment was defeasible, not from any power of revoking or upon the words of the appointment, but from the capacity of the person. He was a person capable to take at the time of the appointment made, but that was *sub modo*, and upon a tacit or implied condition that he should not afterwards happen to become the eldest son and heir. This doctrine of a tacit condition has been recognized in *Savage v. Carroll*, 1 B. & B. 265; *Teynham v. Webb*, 2 Ves. 198; *Hall v. Hewer*, Ambl. 203; *Lincoln v. Pelham*, 10 Ves. 166; *Bowles v. Bowles*, 10 Ves. 177; *per* Sir Thomas Plumer, 3 Sw. 240, Sug. Pow. 619.

The objects
must be
younger
children as
a class.

The power must be to appoint among, or the gift must be to younger children as a class and not persons named: a younger child who is named as an object by the author of the power will take under an appointment to him, although he becomes the eldest son. In *Jermyn v.*

Fellowes, Ca. t. Tal. 93, a power was given by Act of Parliament to a father to appoint among his younger children A. B. & C. A. by his eldest brother's death became entitled to the provision made for the eldest son ; but a subsequent appointment to A. was held good.

The rule last stated must, however, be taken subject to these qualifications :

In order to exclude an eldest son from being an object of a power to appoint among younger children as a class, such eldest son must take the estate under the instrument of settlement ; and such estate must be settled, whether by marriage settlement or other instrument or will, by some person standing in *loco parentis*.

Qualifica-
tion of last
stated rule,

The term "eldest son" does not mean firstborn son, but the son who takes the family estate under the settlement. (*Collingwood v. Stanhope*, L. R. 4 H. L. 43.) "Eldership not carrying the estate along with it is not such an eldership as will exclude." (*Duke v. Doidge*, 2 Ves. sen. 203 n.; *Re Theed*, 3 K. & J. 375.) But it seems that an only son will be an eldest son so as to be excluded from estates settled on children "other than an eldest son," if such only son takes the estates provided for the eldest son. (*Birmingham v. Tuite*, Ir. R. 7 Eq. 321.)

The eldest
son must
take the
estate,

But if the words and intention are clear, a younger son becoming an eldest son will be excluded, although he takes no other provision. In *Livesey v. Livesey*, 2 H. L. C. 419, the testatrix gave the eldest son of E. ten guineas, because he would have a handsome provision from other sources, and she gave one moiety of her residuary estate on trust to be divided among the children of E. then or thereafter to be born, except her

eldest son, or such of her sons as should by the death of his brother become an eldest son. The eldest son of E, was in fact handsomely provided for; he died, but the second son, who thereupon became the eldest, did not succeed to the provision; he was nevertheless excluded. The Court thought that such provision was not the reason for the exclusion; for, by a subsequent clause in the will, the eldest daughter was also excluded, and the clause of exclusion in the will had no reference to the fact of the person to be excluded taking other property, and therefore the period of vesting was alone to be regarded. If the Court had thought that the reason for the exclusion was that the elder son took some other estate, they would probably have come to a different decision (per V. C. Wood, 3 K. & J, 381.)

Eldest son
must take
under the
settlement,

But the principle of *Chadwick v. Doleman* does not apply to a younger son succeeding to the reversion of the settled estates, not under the settlement, but by descent. (*Sing v. Leslie*, 2 H. & M, 68.) The principle that there is a tacit condition, that a younger son, becoming entitled to property limited by a settlement, shall be treated not as a younger but as an eldest son, in respect of that settlement, applies only to cases where he takes under such settlement.

So, where under a power in a marriage settlement uses are revoked and new uses declared, whereby a younger child, who has since become an eldest son, takes through the mere bounty of the donor property which, but for such revocation, he would have taken as eldest son under the settlement, he does not thereby cease to be entitled to the portion of a younger child under the settlement. (*Wandesforde v. Carrick*, Ir. R. 5 Eq. 486.)

Settlement
must be
made by
parent.

Not only must the eldest son take the estate under the instrument of settlement, but such instrument must be made by some person standing to him in *loco parentis*.

In *Sandeman v. Mackenzie*, 1 J. & H. 613, by a marriage settlement, the husband covenanted to pay 10,000*l.* for the children of the marriage; and for want of such children, for the children of the wife by a former marriage; (other than A. her eldest son), as the husband should appoint; and in default, for all who should attain 21 equally, or if but one, then for such one younger child. There were no children of the marriage, but there were two children besides A. of the first marriage; all attained 21. A. died, but it was held that the second son, who thereupon became the eldest and succeeded to the family estates, was not excluded from the benefits of the settlement, for the husband stood in no parental relation to them. It is to be observed that the eldest son was excluded by name in this case; but the decision was not founded on that. And see *Hall v. Hewer*, Ambl. 203.

In *Lord Teynham v. Webb*, 2 Ves. sen. 198, there was a power of appointment among younger children, and a younger child became eldest and was excluded: the settlor and author of the power was the grandmother. In *Lady Lincoln v. Pelham*, 10 Ves. 166, the testator was the grandfather,

The period when the fund becomes distributable is the period for ascertaining the true construction of the instrument of settlement and the position of the children *inter se*.
(*Collingwood v. Stanhope*, L. R. 4 H. of L. 43.)

Period for ascertaining the class of younger children.

With regard to all questions arising on provisions for children under marriage settlements, the Court imputes to the parties (however differently that intent may be expressed, so long as it is not contrary to what is actually found in the settlement) a desire to provide equality for

the children, that no child should take a double portion, and that no child should be excluded. (*Ibid.* 52).

This principle seems applicable also, though perhaps to a less degree, to wills made by persons in favour of objects to whom they stand in *loco parentis*.

It follows therefore that, although it should be said in terms that the elder child is not to have a portion, yet if under such a settlement the one who is really the elder child does not take the family estate, then, the family estate going to a younger son, the Court regards not the elder born, but the younger brother who is in possession of the family estate, as the elder, and the actually elder as the younger, in order to introduce him into the benefits of the portions provided for younger children. The Court will not allow portions to be indefeasibly vested so as to give a double portion to one child and exclude another. Although one child has held the place of a younger child during the period that the settlement has been in existence—that is to say, subsequent to the marriage of the parents—and has therefore become entitled to a portion, and has even had a portion assigned to him, yet if at the period of distribution that child has become an eldest child, then he is no longer entitled to a portion, and the portion which has been assured to him is no longer his; he takes the family estate and the rest of the children are let in as younger children to the benefit of the fund out of which the portions are to be provided, including that portion of the fund which had been assigned to him who has now become the elder child. (*Ibid.* 53.) This would appear to extend to cases where the portion has been not merely appointed but has actually been paid over, if such payment has been made by means of a release of the appointor's life interest. Lord St. Leonards (Pow. 680) says that the change of character must take place before the receipt of the money: that

Must a
portion ap-
pointed
and paid
be re-
funded ?

clearly a younger son becoming eldest and taking the estate, cannot be called upon to refund a portion received out of the estate whilst he was a younger child and in that character; but this can hardly be intended to apply to cases where the portion has been advanced before the period at which it would have been naturally payable.

If the elder child, entitled in reversion on the death of his parents, predeceases them, so that he never becomes owner in possession of the estate, but his next brother acquires the ownership, the estate of the deceased eldest born is entitled through his executors to a share in the provision intended for those who did not take the family estate. *Ellison v. Thomas*, 1 D. J. & S. 18; *Davies v. Huguenin*, 1 H. & M. 730.

When the eldest born's estate is entitled to benefit of portion.

But it will be otherwise if the eldest son has himself by his own action prevented the estate from devolving on him under the settlement, by anticipating it for the purpose of resettlement or otherwise. In *Collingwood v. Stanhope*, L. R. 4 H. of L. 43, the eldest son was tenant in tail: he joined with his father in barring the entail and re-settling the estate; in that case he was held to have had the full benefit of the estates and to be within the words "the eldest son entitled under the will."

When the eldest son prevents estate from devolving on him by his own act.

7. A power of appointment among "the relations" or the "family" of the testator or of A., can be well exercised by an appointment to any relations, although not within the degree of next of kin, if the power authorizes selection. (*Grant v. Lynam*, 4 Russ. 292; *Harding v. Glyn*, 2 W. & T. L. C. 860.) But if the power authorizes distribution merely, and not selection, the donee is confined to the next of

Who are objects of a power to appoint among relations.

kin according to the statute. (*Pope v. Whitcombe*, 3 Mer. 269.)

Family includes husband.

In *Macleroth v. Bacon*, 5 Ves. 159, a power to appoint for the benefit of a married woman and her family was on the construction of the whole will held well executed by an appointment to her husband. But it seems that an appointment to the husband of a married daughter in execution of a power to appoint among children merely, would be bad. *Hanbury v. Tyrell*, 21 B. 322.

Illegitimate child.

In *Lambe v. Eames*, 6 Ch. 597, L. J. James seemed to consider it the better opinion that a gift to A. "to be at her disposal in any way she may think best for the benefit of herself and family," gave A. the property absolutely. But if it did not, he held that an appointment thereunder to an illegitimate child was valid. He said that it was impossible to put any restriction on the meaning of the word, or to exclude any person who, in ordinary parlance, would be considered within the meaning. The word might include sons-in-law and daughters-in-law and many others.

Family or next of kin.

In *Snow v. Teed*, 9 Eq. 622, a power to an unmarried woman to appoint a fund amongst her own "family or next of kin" was held well exercised by an appointment to a nephew, nieces, and a great niece in unequal shares. The power authorized appointments to any person related to the donee in the ordinary acceptation of the word family, which would not strictly speaking be confined to statutory next of kin.

Heirs of the body.

In *Re Jeaffreson*, 2 Eq. 276, there was a gift to trustees on trust to pay the fund to the heirs of the body of A. at their respective ages of 21, in such proportions as A. should appoint. The objects of the gift and power (which, it will be observed, is a non-exclusive one) were held to be such of the statutory next of kin of A. as were descended from her.

8. If the power be not executed, the fund will, without reference to the power having been exclusive or merely distributive, be divided amongst those only who would take under a gift in like terms if no power had been created, unless a contrary intent appear in the instrument. (Sug. Pow. 659.)

What relations are entitled in default of appointment.

A gift to the relations or to the family of a man would *prima facie* include all persons related in however remote a degree: but such a construction would make the gift void for uncertainty. In order to obviate this, it is settled that a gift to relations or family is confined to the next of kin according to the Statute of Distributions, unless there are special expressions showing a different import. *Mahon v. Savage*, 1 S. & L. 111; *Hibbert v. Hibbert*, 15 Eq. 372. "Where the Court holds that there is a trust in default of appointment, wherever it is a trust for relations, the Court puts the construction upon it that if it be a gift to one for life, and after the gift to that person, a gift to the relations of that person, it is the next of kin of that person." Per V.-C. Kindersley, *Re Caplin*, 34 L. J. Ch. 580; 2 Dr. & Sm. 527. The construction is the same, if the gift be to "friends or relations" (*ibid.*), or "to friends and relations." (*Gower v. Mainwaring*, 2 Ves. sen. 86.)

The Court has said, however, that the claimants shall not always take in the proportions of the statute, if the testator has indicated any contrary intention: as for instance, where there has been a power of appointing among "brother and brother's sons," or "children or their issue," the Court has held that under the implied gift all the objects of the power took, not by representation, but *per capita*. *Green v. Howard*, 1 Bro. C. C. 32; *Re White*, John. 656.

In what shares they take.

And although under a gift to the persons who would be entitled under the Statute of Distributions, or to the persons

As joint tenants.

entitled under the statute as next of kin, the persons entitled would take in the statutory shares and not in joint tenancy (*Bullock v. Downes*, 9 H. L. C. 1), if the gift be to "relations" *simpliciter*, they will take as joint tenants. *Eagles v. Le Breton*, 15 Eq. 148.

Real estate.

And as the objects take under the will and not as under an intestacy, they can take real estate. (*Walter v. Maunde*, 19 Ves. 424.)

Wife.

Under a gift by will to the testator's relations, his wife cannot take, for the statute provides for her by the name of wife. (*Green v. Howard*, 1 Bro. C. C. 32.) And the

Family.

word family bears in general the same signification as the word "relations." But the instrument containing the power may itself furnish an interpretation of the expression. In *White v. Briggs*, 15 Sim. 17, a testator directed that the property which he had given by his will to A. should be "secured for the benefit of his family." In the same will he used "heirs" and "family" as synonymous terms. The Vice-Chancellor thought that by family was meant the children, but not the wife, of the nephew. See *Hawkins on Wills*, p. 103.

Who take in default of appointment when there is a previous life estate.

Where a life interest is given by will to a party, with power to select the relations (that is, to such as he shall appoint), it is firmly settled that, in default of appointment, the persons entitled are not the relations living at the testator's death, but those who are living at the death of the donee of the power. (Sug. Pow. 661, citing *A.-G. v. Doyley*, 4 Vin. Abr. 485); *Re Caplin*, 2 Dr. & Sm. 527; *Cruwys v. Colman*, 9 Ves. 319. And the rule is the same, if the power be one of distribution merely, and not of selection. *Finch v. Hollingsworth*, 21 B. 112, correcting the report of *Pope v. Whitcombe*, 3 Mer. 689. "A decision in the contrary way might be productive of great inconvenience: in many cases it might be impossible for the donee to exercise the power, for all the relations

living at the testator's death might be dead at the decease of the donee of the power, and therefore there might then be no person in whose favour an appointment could be made." (21 B. 116.)

But where the distribution or selection is not suspended by the existence of any preceding estates for life, those who are to take are such as answered the description of next of kin of the testator at his death. *Cole v. Wade*, 16 Ves. 27; and see *ante*, p. 387.

And gifts to such of the testator's relations or next of kin as shall be living ten years hence, or as shall survive A., must be distinguished. In such cases the testator means to give it to some class of persons of whom it is doubtful whether they will live ten years or survive A., and he intends that they should pass through that chance. The class is therefore to be ascertained at the testator's death. *Spink v. Lewis*, 3 Bro. C. C. 355; *Bishop v. Cappel*, 1 De G. & S. 411; *Samuel v. Rosser*, W. N. 1872, 152.

Where no preceding life estate.

Where the gift is to the survivor of the relations at a particular period.

9. If a particular class is pointed out, the donee is confined to that class, and to that class alone the Court will give it in default of execution.

Particular class pointed out.

In *Gooding v. Gooding*, 1 Ves. sen. 230, a bequest to such of the testator's *nearest relations* as A. should think poor and objects of charity, was confined to relations within the Statute of Distributions.

"Nearest."

In *Smith v. Campbell*, 19 Ves. 400, a devise to "nearest relations" was confined to brothers and sisters. And "next of kin" *simpliciter* has been held to mean "nearest of kin," and not according to the statute. *Elmsley v. Young*, 2 M. & K. 780.

The addition of the word "poor" will not operate to extend the gift to relations beyond the statutory limit:

"Poor"

although, if the power authorizes selection, the donee may appoint to relations not within the limit who are poor. *Grant v. Lynam*, 4 Russ. 292.

In *Widmore v. Woodroffe*, Ambl. 636, 639, the Lord Chancellor said:—"Several cases have been cited, all proceeding upon the same ground, making the Statute of Distributions the rule, to prevent an inquiry which would be infinite and would extend to relations *ad infinitum*. The Court cannot stop at any other line. Thus it would clearly stand on the word relations only: the word 'poor' being added makes no difference. There are no distinguishing degrees of poverty; and therefore the Court has construed the will as if the word 'poor' was not in it."

Mahon v. Savage, 1 S. & L. 111, seems to be to the same effect: see the second point there decided. But the word "poor" is not nugatory as amongst the statutory relations; i.e., although a gift to poor relations is not enlarged by the word "poor" so as to include relations not within the statutory limit, who are poor, yet in deciding the claims of the statutory relations between themselves, their poverty or affluence is to be taken into consideration.

There is no very recent case on the point; but the remarks of the Lord Chancellor in *Widmore v. Woodroffe*, showing the reason for the rule excluding relations beyond the statutory limit notwithstanding their poverty, do not apply when the relations are a class easily ascertainable, and the question is merely between their claims; and it is to be observed that in that case, the defendant was the only next of kin of the testator.

In *Brunsdon v. Woolredge*, Ambl. 507, a direction that a sum should be equally distributed amongst the testator's mother's poor relations, was construed to mean such of the mother's statutory relations as were poor.

In *Mahon v. Savage*, 1 S. & L. 111, the testator be-

queathed 1000*l.* to his executor to be distributed amongst his poor relations or such other objects of charity as should be mentioned in his private instructions to his executors. No such instructions were left. One of the statutory relations was a poor man at the time of the testator's death, but had become rich previously to the direction to the Master to enquire and report. The Lord Chancellor was of opinion that it was meant as a charitable bequest, and that the objects of the charity should be the testator's own relations: that it was nothing more than ascertaining a number of objects of charity, who could not claim except they were such.

In *Green v. Howard*, 1 Br. C. C. 33, the Lord Chancellor says *obiter* that "where a testator has said 'to relations according to their greater need,' " the Court has shown particular favour to one.

CHAPTER XIV.

POWERS OF JOINTURING.

1. <i>Priority of estates created under powers in settlements</i> 424 2. <i>Powers to jointure are not usual powers</i> 428 3. <i>Are liberally construed</i> . . 429 4. <i>Execution when contingent on possession</i> . . . 431 <i>Covenants to execute power</i> 432 <i>Specific performance</i> . . 433	<i>Damages</i> 433 5. <i>Burdens on jointures</i> . . 435 <i>"Clear value"</i> <i>ib.</i> 6. <i>Period for ascertaining burdens</i> 437 7. <i>Jointure accrues de die in diem</i> <i>ib.</i> 8. <i>Amount in proportion to wife's fortune</i> . . . 438 9. <i>Dower</i> 439
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Priority of
estates
created
under
powers.

1. It remains to consider the powers usually inserted in instruments of settlement so far as their special nature gives rise to special questions. In order to determine the priority of appointments made under such powers the estates created must be referred to the instrument creating the power; the general rule is that

Estates authorized to be created under powers take effect, when created, as if they had been inserted in the original instrument containing the power. (*Braybrooke v. Attorney-General*, 9 H. L. C. 150.)

If, therefore, an instrument create estates and also give a power of appointing charges of any sort, whether for jointure, portions or otherwise, the estates authorized to be created by the power will, on being called into exist-

ence, take precedence of the estates in the settlement, unless there be a contrary intention expressed.

In *Beale v. Beale*, 1 P. W. 246, lands were settled on A. for life, remainder to such woman as he should marry for life, remainders over, with power to charge the premises with any sum of money; such power, unless there be inserted a clause to the contrary, will, like a power of leasing, overreach all the estates. (See this case and the appeal therefrom Gilb. Eq. R. 93, observed on Sug. Pow. 486.)

Lord St. Leonards there says, "If the rule is universally in favour of portions, there is no distinction between a jointure and portions: but either, when raised by means of a power, will prevail over the other, if actually created by the settlement itself. There would, however, be no difficulty in drawing a distinction between the two charges, which is pointed out by their nature. Where they come into competition, the jointure should precede the portions. Where both are created by powers, and although the portions are first charged, a jointure would, it is apprehended, prevail over portions. Upon the same principle a jointure, although limited by the deed creating a power to charge portions, might be allowed to prevail over the portions when charged. The proper place in the settlement in which to insert such a charge is after the life estate of the father, and subject to the jointure of the wife; for such is the position assigned to it in all settlements."

The question must depend on the intention of the settlor or testator in the particular case, and on the nature of the power. In *Mosley v. Mosley*, 5 Ves. 248, a settlement by father and son created terms of years to raise portions for the younger children of the father; a power was given to the son, subject to the father's life estate, to charge portions for his younger children. The

son exercised his power; and the charges created thereby were held to have priority over the charges secured by the terms in the settlement for the father's younger children. The Master of the Rolls said, "The moment the power is executed, it is as if in the original deed, and in that way it will stand now. This power is subject to the father's life estate. . . . The moment he raises the term it is put in after the life estate of his father. I cannot, in point of conveyancing, put it anywhere else. It may be a blunder of the conveyancer. . . . That it is strange, must not be talked of either upon a deed or upon a will; but I must ask, what is the construction?"

In *Simpson v. O'Sullivan*, 7 C. & F. 550, lands were settled on A. for life with remainder to trustees to raise an annuity for A.'s widow for her jointure; and the settlement contained a power for A. to raise a sum for his own benefit; the power, when exercised, overrode the widow's estate.

In *Bailey v. Tennant*, 11 Ex. 776, lands were vested in the trustees of a marriage settlement for a term of years to secure portions for younger children of that marriage; and the settlement also contained a power for the husband to jointure a future wife. The power was eventually exercised, a term being limited to secure the jointure. This jointure was held to take priority over the term for raising portions for the children of the first marriage.

Priority of
powers in
the same
instrument
inter se.

Where several powers have been given by the same deed, and two or more of them are executed, and no provision has been made in regard to their priorities, the intention of the settlement and the object of the powers are the best guides to the construction. (Sug. Pow. 488.)

Priority of
jointure.

A jointure takes effect from the nature of things immediately upon the husband's death. It will, as a general rule, override all powers and estates in the same settlement; unless it be otherwise provided by the instrument

creating the power. (Sug. Pow. 485.) *Hall v. Carter*, 2 Atk. 354; *Sandys v. Sandys*, 1 P. W. 706; *Reynolds v. Meyrick*, 1 Eden, 48.

It will be otherwise if the portions are in effect appointed under a power in a *former* settlement. *Re Nash*, 5 Ir. Ch. R. 384.

And if a jointure, when it arises, is intended by the creator of the power to take effect merely as one of several rent-charges or annuities, it will have no precedence, and on a deficiency of assets, must abate with the other annuities *pari passu*. Thus in *Coore v. Todd*, 7 D. M. & G. 520, a testator devised lands to trustees on trust out of the rents to pay an annuity to A. B. until he attained 25, (when he was to have possession of the estates) and an annuity of 400*l.* a year to C. D. for life, and an annuity of 150*l.* for the maintenance of any infant tenant in tail during minority; and without prejudice to the trusts aforesaid, and to any jointure to be created under the power thereafter contained, to pay the surplus rent to the mother of A. B. until he should be entitled to possession of the estates, and subject to the trusts aforesaid, the trustees were to hold the estates in trust for A. B. for life, with remainder to his eldest son in tail, with power to A. B. to appoint a jointure to any wife, with usual powers of distress and entry, to take effect immediately after his decease. A. B. appointed a jointure under his power and died, leaving his widow, who gave birth to a posthumous child, who became tenant in tail. The income proved deficient; and it was held that C. D.'s annuity, the maintenance annuity of the infant tenant in tail, and the jointure must abate rateably; but that there should be no retrospective apportionment so as to affect the amount received by C. D. previously to the birth of the infant tenant in tail.

Lord St. Leonards concludes that with respect to the

ordinary powers in a settlement, their relative priorities may be left to the operation of law, since the order in which they take effect is matter of inference from their nature; to which Mr. Davidson (vol. iii. 489) adds, that with settlements containing powers of charging for the donee's own benefit or for other persons not comprised in the ordinary and recognised scheme of strict settlement, it is proper to define with exactness the extent to which it is intended that they shall override the settlement.

Priority of
powers of
sale, &c.

Powers of sale, exchange, and partition, necessarily over-ride all estates created by the settlement, unless there be any intention expressed, to the contrary and subject to any estates which have been created under paramount powers. (Sug. Pow. 482-3.) But powers of leasing generally or always have precedence, although there be no clause marshalling the powers. (*Per V.-C. Knight-Bruce*, 1 De G. & Sm. 659.) It holds generally true that a power to create leases to take effect in possession, will control and overreach all the powers and estates in the settlement. (Sug. Pow. 483.) *Lewis v. Rees*, 3 Jur. N. S. 12.

In *Taylor v. Stibbert*, 2 Ves. jun. 437, a purchaser from tenant for life under a power of sale, was held bound by the covenants and terms of a lease granted by the tenant for life in execution of a power of leasing, (although such lease transgressed the terms of the power) to the same extent that the tenant for life himself would have been bound.

As it is impossible that a settled estate can be enjoyed except by means of the exercise of a power to lease, the Courts never allow leases granted by the tenant for life under his power to be defeated by the exercise of a power in the trustees to appoint new uses with the concurrence of the tenant for life. (8 Sim. 158.)

Are not
"usual
powers."

2. Powers of jointturing are not, it seems, usual powers, within the meaning of a direction to make a settlement

“with all usual powers:” for they diminish the estate, and there is no certain rule as to their quantum; the words “usual powers” refer to the usual and necessary powers of management. (Cf. *Hill v. Hill*, 6 Sim. 145.)

In marriage settlements, these powers are usually limited to enabling the husband to jointure a future wife, but in family settlements, and in wills, they extend to enable the successive tenants for life, as they come into possession, to provide for their wives. (Davidson, iii. 374.)

3. A power to jointure, although a burden on the estate, is liberally construed in equity, so far as its execution is concerned, inasmuch as the object is one of a class highly favoured by the Court. Thus, equity will aid a defective execution of a power to jointure. In *Coventry v. Coventry*, 2 P. W. 222, a covenant in marriage articles to convey and appoint estates after the marriage for jointure according to the power of the covenantor or otherwise, was aided as a defective execution. And a covenant to limit a jointure, in execution of a power which is only to be exercised when the donee is in possession, has been aided. (*Alford v. Alford*, 2 P. W. 230, *post*, p. 432. And see *ante*, p. 275.)

Liberally
construed.

The question whether a particular power can be exercised in favour of a wife already taken, or of a second wife, must depend on the wording of the power in question. In *Re Burrowes*, Ir. R. 2 Eq. 468, there was a devise of land to two brothers successively for life, and power was given to them, when and as they should respectively become seised in possession, by deed or writing “to be made upon or previously to their marriage,” to jointure their wives. One of the life tenants married after the date of the will, but before the testator’s death in 1834. His execution of the power was held invalid. And see *Dillon v. Dillon*, 11 Ir. Eq. R. 423.

When exer-
ciseable
after mar-
riage or in
favour of
second
wife.

The limits of a power of jointuring are usually clearly defined ; the remaindermen are entitled to say that those limits shall not be exceeded, but within such limits, the Court will give every aid to the jointress.

Not usually
restricted
to one wife,

It would therefore, it seems, require express words of restriction to make it necessary that a power of jointuring should be exercised *uno flatu* : or that it should be exerciseable in favour of one wife only.

In *Zouch v. Woolston*, 2 Burr. 1136, the words were that the husband should have power "from time to time during his life, by deed or deeds, writing or writings, to limit all or any part of the estate to any woman or women that shall be his wife or wives, for and during their life or lives ;" and it was held that the power might be executed at different times ; for the words were applicable to each respective wife, and empowered the husband to make different settlements upon the same wife.

In *Hervey v. Hervey*, 1 Atk. 560, the power was to settle lands of a certain value for a jointure or provision for such wife during her natural life. (2 Burr. 1144.) Lord Hardwick said that it was very plain that it was a power to settle a jointure upon any after wife, and so *toties quoties* upon any subsequent marriage.

In *Maulthby v. Maulthby*, 2 Ir. Ch. R. 32, a testator devised estates to his son for life, with remainders over, and empowered him to make a settlement for the use of any wife he might marry. The son executed a settlement upon his first marriage, and purported thereby to reserve to himself power to jointure a second wife. He married again after the death of his first wife, and charged a jointure for the second wife, as if in execution of the power. The attempted reservation of a power in the settlement was clearly invalid, but it was held that he had under the will power to jointure a second

wife, although he had exercised his power on his first marriage.

In *Mason v. Mason*, Ir. R. 5 Eq. 289, lands were devised to trustees in trust for A. for life, and in case he should think of marrying, the trustees were empowered and directed to settle and secure the lands as a jointure on his wife and to their issue, share and share alike. A. married twice, but the power was not exercised. He died leaving issue of the first marriage and his widow, but no issue of the second marriage. It was contended that a settlement ought to be prepared as if upon the occasion of the first marriage, where, after providing a jointure for the wife, the property would be limited to the children of the first marriage, and there would be no means of providing a jointure for a future wife. But the Vice-Chancellor thought that if the husband were the donee of the power he could exercise it on his second marriage, and that it made no difference that there was a direction to the trustees to execute a settlement for the same purpose. *Allanson v. Clitherow*, 1 Ves. sen. 24, is a peculiar case, in which the object of the power was to make a strict settlement rather than a jointure. (Sug. Pow, 701.)

4. The right to exercise the power is usually made contingent upon possession. It has been before stated (p. 118), that a power to be exercised upon a contingency may be well exercised before the event happens: but (p. 120) that a power which is not to arise until a future event happens cannot be exercised before that event, for until then it has no existence: and if there is no power at all, there can be no execution of it, defective or otherwise. It is perhaps difficult to reconcile the decisions as to jointures with these rules, unless it can be said that in all cases such a power is presently given. Lord Redesdale, in *Shannon v. Bradstreet*,

Power usually exercisable during possession.

1 S. & L. 63, says that in cases without number, upon jointuring powers particularly, it has been determined that a covenant is a sufficient declaration of an intent to execute, *even when made before the power arose*, as where a power is limited to be exercised by tenant for life in possession, and he covenants that when he comes into possession he will execute: in all these cases Courts of equity have relieved.

In *Alford v. Alford*, cited 2 P. W. 230, 1 Str. 596, A. settled lands upon himself for life, remainder to his wife for life, remainder to his first and other sons in tail, remainder to B. for life, remainder over; with power to B., *after the death of A. and his wife*, to jointure a wife. B. on the occasion of his marriage in the lifetime of A., covenanted to execute his power when in possession. A. and his wife died without issue, and B. came into possession, but never settled the estate: it was decreed that the power was well executed.

In *Jackson v. Jackson*, 4 Bro. C. C. 461, a settlement contained limitations of successive life estates to father and son, with remainders over, and authorized the father and son, *when they should respectively be in actual possession*, to make jointures. The father and son entered into a general covenant (without reciting or referring to the power) that the son should within twelve months make a jointure on a then intended wife. The father died within the twelve months: the son entered and died without making any settlement. The Master of the Rolls held that the power was in the contemplation of the parties at the time of making the articles: that the settled estate was the only estate on which the covenant could attach, and it did attach: and that the persons entitled had a right to call for an execution of the covenant.

Incapacity
of cove-

And the same principle which gives effect to a cove-

nant as an execution, although the covenantor when he comes into possession forgets or refuses to fulfil his covenant, gives effect to the covenant against a subsequent want of capacity: in both cases effect is given to the instrument without reference to the subsequent want of consent or capacity on the part of the donee of the power. In *Affleck v. Affleck*, 3 Sm. & G. 394, A., who was entitled to real estate in remainder expectant on the death of B., and was empowered when he should be in possession to limit a jointure, covenanted on his marriage in B.'s lifetime, that if he came into possession he would exercise the power. A. became of unsound mind before he came into possession, and continued so down to his death, which happened after the death of B. It was held that the Court was bound to aid the covenantee and enforce the charge against the remainderman.

nantor
when in
possession
makes no
difference.

It is of course clear, that if the donee of the power does not live to come into possession, the contingency on which the power was dependent will not have happened, and equity can give no assistance: and the power cannot be accelerated by collusion between the donee and the owner of the previous life estate. *Truell v. Tyssen*, 21 B. 441, *ante*, p. 124.

If the covenantor after coming into possession refuse to carry out his covenant, a decree for specific performance may be obtained to compel him to execute a deed of appointment in accordance with his covenant; and if he refuse to execute such deed, the Court will declare him a trustee within the Trustee Acts of the estate subject to the power, to the extent necessary to raise the annuity, and will appoint a person to execute the deed of appointment in his place. *Wellesley v. Wellesley*, 4 D. M. & G. 537.

Specific
perform-
ance of
covenant
to join-
ture.

If a man covenants that the jointure is of given value, his estate must make good any deficiency (*Probert v.*

Covenant
that join-

ture is of
given
value.

Morgan, 1 Atk. 440), unless it be clear that the covenantor intended merely to covenant to make a jointure in accordance with the power, and covenanted by mistake to appoint more than the power authorized; (*Lady Londonderry v. Wayne*, Ambl. 426,) but this can only be where it is clear that a mistake has been made by *all parties*. Sug. Pow. 707.

Recital,
when a
covenant.

A recital in a deed may amount to a covenant, if it be plain from the whole deed that it was so intended; but the Court is cautious in spelling a covenant out of a recital; because it is not the part of a deed in which covenants are usually expressed, (*Lay v. Mottram*, 19 C. B. N. S. 479.)

In *Burrowes v. Burrowes*, Ir. R. 6 Eq. 368, a settlement, to which A. (the father), B. his daughter, and her intended husband were parties, recited that A. agreed to give and appoint to his child B. 3000*l.*, of which 1000*l.* was to be paid in cash, and the remainder to be charged on the estates of A., and that the husband had agreed to make certain charges in favour of B. and their children; and that A. had under a power charged his estates with 3000*l.*, and that it had been agreed that A. should pay 1000*l.*, part of B.'s portion, to the husband at once, and that A. should appoint 2000*l.* (the residue of the 3000*l.*) as a charge on his estates, the sums to be in full for B.'s portion. This appointment was afterwards made: and B. and her husband released A. and his heirs from all claims in respect of other provisions for children. This recital was held not to amount to a personal covenant by A., although it should prove that the 2000*l.* was not well charged, by reason of the execution of the power being invalid. And generally as to recitals operating as covenants, see *Holles v. Carr*, 3 Sw. 638; *Duchett v. Gordon*, 11 Ir. Ch. R. 181; *Monypenny v. Monypenny*, 9 H. L. C. 114; *Thompson v. Thompson*, Ir. R. 6 Eq. 113, 322; *Weldon v. Bradshaw*, *ib.* 7 Eq. 168.

And if the husband appoints the jointure in consideration of his wife's fortune, no claim can be maintained by him or in his right, while the terms are not fulfilled on his part. *Mitford v. Mitford*, 9 Ves. 87.

5, Formerly it was common to give power to appoint lands not exceeding a certain yearly value by way of jointure, but the power in modern practice is in general to appoint a rentcharge or rentcharges not exceeding a certain amount. (Davidson, iii. 376.) This distinction must be borne in mind in considering from what taxes jointures may be appointed free. In *Hervey v. Hervey*, 1 Atk. 560, it was considered clear that a power to A. to make a jointure of such of the settled lands as he thought proper not exceeding 600*l.* per annum, would not authorize the settlement of an annuity clear of taxes; and it was so held in *Londonderry v. Wayne*, Ambl. 424.

Appoint-
ments
of jointures
free from
taxes.

But it seems the better opinion that, if a yearly amount by way of rentcharge is authorized, an appointment may be made free from participation in the burdens of the land. (Davidson, iii. 380.)

Where the power was to appoint any part of the premises, not exceeding a certain clear yearly value, to a wife for her jointure, Lord Hardwicke said that the word "clear" was to be construed, as it would be in an agreement between buyer and seller; that is, clear of all outgoings, incumbrances and extraordinary charges, not according to the custom of the country, as tithes, poor-rates, churchrates, &c., which are natural charges on the tenant. If in the country where the estates lie, it had been the custom for the landlord to pay those rates the jointure ought to be subject to them, for they would in such case only be ordinary charges. *Tyrconnel v. Duke of Ancaster*, Ambl. 239. Such a jointure will be clear of land tax. 1 Bro. C. C. 4, n.

"Clear
value."

In *Trevor v. Trevor*, 13 Sim, 108; 1 H. L. C. 239, an estate was by will directed to be settled in strict settlement, and in the settlement was to be contained a power for the tenant for life to jointure "to the extent of one fifth part of the then ordinary annual rental of the estates." It was held that the settlement ought to authorize the tenant for life to charge the estates with a clear yearly rentcharge, not exceeding one fifth of the yearly rent of the estates payable at the time of creating the charge. The House of Lords affirmed the decree without entering into this point at all. See this case observed on by Lord St. Leonards, Prop. H. of L. 489, where he concludes that the settlement only authorized the appointment of a jointure equal to one fifth of the rent received by the landlord, after the deduction of land tax and the like, but when so fixed, remained payable at that sum for the whole life, clear of deduction, obviously because the proper deduction was made once for all when the actual amount was fixed.

"Without
any deduc-
tion."

The usual form in instruments at the present time is to authorize a rentcharge of the amount specified to be charged "without any deduction."

Succession
duty.

These words will exonerate the jointress from succession duty (if any), the effect of the words being to make an additional grant; or rather, it is an integral part of the grant of the rentcharge, conveying to the jointress the right of having any such deduction raised, and imposing on the trustees the obligation of having the rentcharge paid without any such deduction, that deduction being left to be satisfied out of the other rents of the estates which they would have a right to raise, plus the amount necessary to satisfy the rentcharge, *Floyer v. Bankes*, 33 L. J. Ch. 1.

Income
tax.

But the jointress must pay income tax out of her jointure. *Sadler v. Richards*, 4 K. & J. 302.

6. Where lands of a given value are to be settled, the taxes from which the jointure is to be free are to be ascertained at the time of the execution of the power. *Tyrconnel v. Duke of Ancaster*, Ambl. 239; *Trevor v. Trevor*, 13 Sim. 136. Although Lord Henley held that the death of the husband was the proper period. *London-derry v. Wayne*, Ambl. 426; Sug. Pow. 705.

Period for
ascertain-
ing the
burdens.

7. A power to charge a jointure (which is an estate in lands limited to a wife expectant upon a life estate of her husband) cannot be properly executed by an appointment of a sum to be paid immediately on the appointor's death; the jointure arises out of the rents and profits of the land as they arrive *de die in diem*.

Jointure
must arise
*de die in
diem*.

But if the donee of the power in exercising it charge a jointure of less amount than that authorized, but direct an immediate payment of a certain amount, it seems that such immediate payment, if, with the amount of the jointure properly appointed, it do not exceed the limits authorized, may be taken as an appointment of a jointure of a larger sum (*i.e.* of the amount at once payable and of the jointure) for the first year, and of a smaller sum (*i.e.* of the jointure only) for the future. Of course, if the amount directed to be immediately paid, when added to the jointure proper, exceed the amount authorized to be charged, the appointment will fail *pro tanto*.

The question as to what would be the effect of the death of the jointress before the first regular day of payment, has never been decided; but by virtue of the Apportionment Acts (4 & 5 Wm. 4, c. 22, and 33 & 34 Vict. c. 35) the jointress would be entitled to a proportionate part of the jointure calculated at the larger amount; and if such larger amount should be less than the amount authorized to be charged, the estate of the jointress would be entitled not merely to an apportioned part of such larger amount, but to an amount equi-

valent to an apportioned part of the whole amount authorized to be charged, on the ground that the apportioner meant her to have so much down, and that his intention ought to be carried out as far as is practicable.

In *Purcell v. Purcell*, 2 Dru. & War. 217, the power was conferred by will in these words: "I hereby empower my son W. to charge said land with a jointure by deed or will for any wife he may marry." The son purported to exercise the power, and directed the first payment of the rentcharge to be made on the day of his own decease. The Lord Chancellor said, "The party had a general power to jointure, and, within the value of the property, there was no limit to the amount. It is not perhaps a natural construction of this power to say, that the jointure might be made payable instantan upon the death of the donee; but this result might have been indirectly effected, for the appointee, the jointress, having lived beyond the first regular day of payment, there was nothing to have prevented the party from appointing that on the first regular day of payment, she should receive double the sum to which she was to be entitled on every subsequent day. I may consider the case, just as if he had directed that an amount equal to both the first and second payments should be payable on the first regular day of payment after his decease. If, indeed, the jointress had died before the first day, a question might have arisen, but as the case now comes before me, I do not see why I cannot, in favour of the intention, do that in the manner I have pointed out, which he clearly had the power to accomplish."

Jointure
in pro-
portion to
wife's for-
tune.

8. It was formerly not unusual to make the power to jointure in proportion to the amount of fortune brought into the family by the lady. If such be the case, the transaction must be fair: a nominal portion is not suffi-

cient : nor if the husband or his friends advance money to make up the sum, and it is afterwards repaid : nor if the wife's portion is settled to her separate use. The view of making such powers is, that the person may marry providently, and not burden the estate with a jointure for a woman that brings nothing. It is not necessary that the portion should be paid to and actually spent by the husband ; where the portion is settled in a proper and reasonable manner for the benefit of the family in a fair way of contracting, that is not within the reason of the cases on fraud and collusion. *Tyrconnel v. Duke of Aneaster*, Ambl. 238.

A power to jointure to such amount as A. shall deem expedient in proportion to the portion he may receive with his wife, authorizes a jointure, although the wife brings no portion. *Re Molton*, 2 Ir. C. L. R. 634.

9. An appointment under a power to appoint a provision Dower. for or in the name of jointure will not bar dower, unless the appointor so declare ; and it seems clear that the appointor may lawfully make such a declaration. (Sug. Pow. 707.) And as to dower, see now 3 & 4 Wm. 4, c. 105.

CHAPTER XV.

POWERS OF CHARGING.

<p>1. <i>Are not usual powers</i> . . . 440</p> <p>2. <i>Indefinite powers of charging lands, and of charging rents and profits</i> . . . 441</p> <p>3. <i>Portions secured on reversionary term</i> . . . 441</p>	<p>4. <i>A power to charge authorizes charge of interest</i> . . . 442</p> <p>5. <i>Tenant for life must keep down interest</i> . . . 443</p> <p>6. <i>Powers to charge created by reference</i> . . . 445</p> <p>7. <i>Lapse of charges</i> . . . 446</p>
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Not usual power.

1. It has been held that powers of this nature are not usual powers within the meaning of a direction to make a settlement "with all usual powers, including a power to jointure." *Higginson v. Barneby*, 2 S. & S. 517, and *cf. Duke of Bedford v. Marquis of Abercorn*, 1 M. & C. 312, and *ante*, p. 429.

Indefinite charge on rents and profits.

2. A power of charging land will authorize a charge upon any portion thereof, and a power of charging indefinitely may be executed by a sale so as to bind the whole inheritance. *Long v. Long*, 5 Ves. 445. Equity will at any rate decree a sale to raise the charge. Sug. Pow. 429. And an unlimited indefinite charge upon rents and profits is a charge upon the *corpus*, just as an unlimited indefinite gift of rents and profits is a gift of the *corpus*. *Phillips v. Gutteridge*, 3 D. J. & S. 332.

Authorizes sale.

Such a charge authorizes a sale. In general where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine them to the receipt of the rents and profits when

they accrue, the Court, in order to obtain the end which the party intended by raising the money, has by a liberal construction of these words taken them to amount to a direction to sell. *Green v. Belchier*, 1 Atk. 505.

The expression "rents and profits" will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage. *Bootle v. Blundell*, 1 Mer. 193, 233.

But the person who creates the charge may evince an intention that it shall affect the rents and profits as they arise only. *Foster v. Smith*, 1 Ph. 629; *Earle v. Bellingham*, 24 B. 445; *Wilson v. Halliley*, 1 R. & M. 590.

And there may be cases where the *corpus* is not charged, but there is a continuous charge on the rents and profits. *Booth v. Coulton*, 5 Ch. 684; and see *Taylor v. Taylor*, 17 Eq. 324, Hayes' Concise Prec. of Wills, 156.

3. If there be a limitation to a parent for life, with a term to raise portions for children at 21 or marriage, to take effect according to his appointment, *prima facie* the intention is that the donee should be able to appoint that the portion should be immediately raised: and this intention will not be controlled by the fact that the term for securing the portions is reversionary, nor that the settlement contains a maintenance clause. *Smyth v. Foley*, 3 Y. & C. Ex. 142; *Michell v. Michell*, 4 B. 550.

Portions
secured on
reversionary
term.

In *Keily v. Keily*, 4 Dr. & War. 38, on the marriage of B. lands of A., his father, were vested in trustees in trust for A. during B.'s life, and subject thereto to

secure a jointure and to raise 4000*l.* for younger children, to be divided according to B.'s appointment, and in default equally, and to be payable at twenty-one or marriage, "if such respective times of payment should happen after the death of B., but if before, then within three calendar months after the death of B., and not before or sooner, unless with the consent of A. if living, and if dead, of B." B., after A.'s death, appointed in favour of a younger child who had attained twenty-one, and directed such portion to be raised and paid at once. This appointment was held to be authorized by the settlement.

"The rule upon the whole depends upon this : whether it was the intention of the parties to the instrument, attending to the whole of it, that the portion should or should not be raised in this manner: taking it *primâ facie* to be the intention upon the general rule, if there is nothing more than a limitation to the parent for life, with a term to raise portions at the age of twenty-one or marriage, if there is nothing more and the interests are vested, and the contingencies have happened on which the portions are to be paid, the interest is to be paid and the portions must be raised in the only manner in which they can be raised; that is, by mortgage or sale of the reversionary term." *Codrington v. Foley*, 6 Ves. 364, 380; *Hall v. Carter*, 2 Atk. 356; *Wynter v. Bold*, 1 S. & S. 507.

Power to charge authorizes charge of principal and interest.

4. A power to charge an estate with a gross sum implies a power to charge it with interest, because it may be necessary that interest should be given by way of maintenance, for there may be no other. *Boycot v. Cotton*, 1 Atk. 555; *Roe v. Pogson*, 2 Madd. 457; *Lewis v. Freke*, 2 Ves. jun. 507.

In *Simpson v. O'Sullivan*, 3 Dr. & War. 446, the power was to raise "by deed, mortgage, or any other writing;" in this case there could be no doubt, for a mortgage necessarily supposes the security of a principal sum with interest. And if the party entitled to charge, or to give interest from the time the fund is to be productive, fixes the rate, the Court cannot control his discretion, either by diminishing it, if he gives more than 4*l.* per cent., (the amount allowed by the Court) or by increasing it if he gives less. *Lewis v. Freke*, 2 Ves. jun. 507.

But the interest ought not to be directed to accumulate, but should be paid annually; for when it is given at the rate of 5*l.* per cent. the natural construction is, that it should be paid annually and become due every day, for it is given as a recompence in the mean time, till the principal is due. *Boycot v. Cotton*, 1 Atk. 555.

And the person who has sustained a child, in whose favour a charge has been made, will be entitled to the interest, for it is given for maintenance. (*Ib.* 556.)

If the terms of the power do not admit of the raising of the principal in the lifetime of the tenant of the particular estate, interest cannot be due until after his death: for interest is only in lieu of non-payment of principal. *Churchman v. Harvey*, Ambl. 341.

And it seems that if the charge is to be raised out of annual rents and profits, it will not carry interest. *Evelyn v. Evelyn*, 2 P. W. 666.

5. The tenant for life is bound to keep down the interest on charges upon the estate; and that, too, although he has also an absolute power of appointment. *Whitbread v. Smith*, 3 D. M. & G. 741.

But he is not bound to defray the arrears of interest which have accrued during the lifetime of a preceding

Interest to
be paid
annually.

Charge
raiseable
out of
annual
rents.

Tenant for
life must
keep down
interest.

tenant for life ; it is the duty of the reversioner, as much as of the tenant for life in remainder, to see that the tenant for life in possession pays the interest. *Caulfield v. Macguire*, 2 J. & L. 160; *Sharshaw v. Gibbs*, Kay, 333. If, therefore, a subsequent tenant for life is compelled to pay arrears of interest upon a charge affecting the inheritance which had accrued during a prior life estate, he is entitled to repayment of that sum out of the inheritance. *Kirwan v. Kennedy*, Ir. R. 4 Eq. 499. But where the tenant for life overpaid interest upon a charge by mistake, the Court would not allow him to be repaid out of the inheritance, although the overpayment was made by a receiver appointed by the Court. (*Ibid.*) But every tenant for life is liable for his own time, and, in order to liquidate any arrears that may accrue during his own time, he must furnish all the rents, if necessary, during the whole of his life. (Kay, 333.)

Payment of
interest in
excess of
rents.

A tenant for life, who pays off a charge, is in general entitled to be a creditor for the amount he has paid, although he has taken no assignment of the charge (*Jones v. Morgan*, 1 Bro. C. C. 206); but the converse rule applies to the cases of tenant for life paying interest in excess of the rents and profits of the estate. If in such a case he pays the interest, although the rents and profits are insufficient for that purpose, he cannot make himself an incumbrancer on the estate for this excess in his payments, if he has not given to the remainderman any intimation of the insufficiency of the rents and profits, and of his intention to charge the excess of his payments on the inheritance. Under such circumstances, there is a presumption of the sufficiency of the rents and profits, and the personal representatives of the tenant for life cannot be allowed to rebut that presumption. *Lord Kensington v. Bouverie*, 19 B. 39; revd. 7 D. M. & G. 134; but affirmed by three Lords to two, 7 H. L. C. 557. This

decision rested on two grounds: first, that under the circumstances the sufficiency of the income to pay the charges was to be presumed; secondly, that there was evidence of the intention of the tenant for life to take the whole burden on himself. (Ir. R. 4 Eq. 503.)

It seems, therefore, that it would need an express declaration of intention and notice to the remaindermen to enable the tenant for life to claim successfully any sum he may have paid in excess of the rents and profits on account of interest. But if such a charge is established, the account to be taken would extend over the whole period during which the tenant for life had been in possession; no Statute of Limitation would apply (9 D. M. & G. 157; *Burrell v. Egremont*, 7 B. 205); but it seems that the tenant for life would not be regarded as mortgagee in possession, so as to compel him to account on that footing for the rents which, but for his own wilful default, he might have received. (7 D. M. & G. 156.)

Extent of
account,

It is clear, however, that if the rents are insufficient and the tenant for life applies the rents so far as they will go during his lifetime, but does not pay the deficiency, the remainderman cannot after his death redeem, except on payment of that deficiency, or so much thereof as can be claimed, having regard to the Statute of Limitations.

6. Although referential trusts and powers are not, as a general rule, to be read as multiplying charges (*Hindle v. Taylor*, 5 D. M. & G. 577; *Baskett v. Lodge*, 23 B. 138), this does not apply where the estate on which the incumbrances are charged is increased proportionately.

Powers to
charge
created by
reference,

In *Cooper v. Macdonald*, 16 Eq. 258, a testator made a series of specific devises on trust for each of his children for life, with power for such child to appoint to his widow or her surviving husband an annuity not exceeding one-third of the income of the property specifically devised to him or her; he gave his residuary estate upon and for

the same trusts and purposes, and with the same or the like powers, in favour of all his children, share and share alike, and their issue, as should correspond with those thereinbefore expressed and declared concerning the estates specifically devised. The power was to appoint an annuity not exceeding a certain proportion of the income of the property charged therewith. The testator gave other property and subjected it to the same powers: but the proportion still held: the intention was considered to be that the power was applicable to the added as much as to the original property. But it would have been otherwise, if the annuity had been of a specific amount.

And a power of charging, which is given to A. by reference to another power given to B., will be free from all contingencies which are personal to B.: if this were not so, A.'s power might very probably be one that would evanesce altogether. *Harrington v. Harrington*, L. R. 3 H. of L. 295.

Generality
of charging
power not
to be
limited
against in-
tention.

A power to charge, without regard to any events which may happen, except only the event of certain numbers of children coming into existence, when once it has been called into existence by the birth of children, cannot be limited, controlled, or questioned in any degree on the ground that under different states of circumstances different results would be arrived at: not even by the extreme case of so many children being born as to make the charges so numerous as to eat up all the estate. *Knapp v. Knapp*, 12 Eq. 240.

Lapse of
charges
created
under
powers.

7. If a charge be created under a power, whether with or without interest, and the donee dies before the age at which it becomes payable, the charge will sink into the estate (1 Atk. 555); so, if a testator executes a power of charging by will, and the donee dies before the will takes effect, the charge will lapse for the benefit of the estate.

If, however, the charge be called into existence, and the intention be clear that it is to be a charge at all events, and the intention that the donee should take is merely secondary, then the charge will remain for the benefit of the next of kin or residuary legatee. *Fosberry v. Smith*, 5 Ir. Ch. R. 321.

In *Simmons v. Pitt*, 8 Ch. 978, a testator having a general power to charge real estates by deed, exercised his power by charging them with 6000*l.* and interest, to be paid after the deaths of himself and his wife to such persons as he should by will appoint. The trusts directed by his will with regard to this sum were void under the Thellusson Act. This charge was regarded as personalty, and formed part of the testator's residuary estate, and went to the next of kin. The charge was disposed of as personal estate, and was personal estate before it was appointed.

If the power were limited, the donee could not of course by his will call the charge into existence so as to keep it alive, notwithstanding the death in his lifetime of all the objects of the power.

And as to the doctrine of the Court that portions, although in a sense vested, shall not be raised, unless they are actually required, see *Davies v. Huguenin*, 1 H. & M. 730; *Remnant v. Hood*, 2 D. F. & J. 396; and as to double portions, see *Chichester v. Coventry*, L. R. 2 H. of L. 71; *MacCarogher v. Whieldon*, 3 Eq. 236; *Dawson v. Dawson*, 4 Eq. 504; *Stevenson v. Masson*, 17 Eq. 78.

CHAPTER XVI.

POWERS OF SALE, EXCHANGE, ETC.

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Are usual powers.

1. POWERS of leasing, of sale and exchange, and, where there is any joint property, or there are any mines or any land fit for building purposes, powers of partition, of leasing mines, and of granting building leases, are powers for the general management and better enjoyment of the estates, and such powers are beneficial to all parties. (*Hill v. Hill*, 6 Sim. 145.) Powers of sale are therefore "usual powers" within the meaning of an agreement to make a settlement containing all usual powers. In *Duke of Bedford v. Marquis of Abercorn*, 1 M. & C. 312, it was provided by antenuptial marriage articles that the settlement (which was to relate to lands in Ireland) should contain all the covenants, provisions, and conditions usually contained in marriage settlements in England. This authorized the insertion of a power of sale and exchange, and the Lord Chancellor saw no reason for confining it to lands in Ireland, but thought that it might

very well extend to lands in England. And see *Peake v. Penlington*, 2 V. & B. 311.

If a testator simply directs a settlement, but says nothing as to the powers to be contained therein, it seems the better opinion that he must have intended all the usual powers of leasing, sale, and exchange, and for the appointment of new trustees, together with a receipt clause, to be inserted. It was so held by Lord Romilly in *Turner v. Sargent*, 17 B. 515. But in *Wheate v. Hall*, 17 Ves. 80 (which was not cited in the last-mentioned case), Sir Wm. Grant refused to compel a purchaser to take a title depending on the execution of a power of sale, which had been inserted in a settlement made under the decree of the Court, in a suit to carry into execution the trusts of a will. The will merely directed a settlement so as to secure the estate to certain persons in succession. The Master of the Rolls thought that no great stress could be laid on the direction to secure the estate to the successive devisees, as indicating an intention to exclude a power of sale: but in the absence of any expression from which the intention to include such power could be inferred, he was not aware that it was ever decided that the introduction of such a power under such circumstances was of course: nor had he learnt that it was the practice to insert a power of sale in executing such a trust, where the will was entirely silent.

It has been held that where some powers (not including a power of sale) are expressed, a power of sale cannot be implied. In *Brewster v. Angell*, 1 J. & W. 625, there was a direction to insert all proper powers and authorities for making leases and otherwise according to circumstances, to and for the tenants for life, to be exercised by them at such times as they should by law be qualified to do so, and the same powers and authorities to be exer-

Where no directions are given.

Where some powers are directed.

cised on their behalf by A. and B., their heirs and successors, whenever such tenants for life should be disabled or disqualified, &c. This was held not to authorize the insertion of a power of sale, whether exerciseable by the trustees or by the tenant for life. (*Horne v. Barton*, Jac. 437.)

But in *Tasker v. Small*, 6 Sim. 625, 3 M. & C. 68, marriage articles recited that it had been agreed that estates of which the husband was tenant in tail, should, subject to raising 15,000*l.* by mortgage or otherwise for the husband's use, be settled as therein expressed; and the husband covenanted to settle accordingly, subject to the raising of the said sum, by mortgage, annuity, or otherwise, and to any deeds for securing the repayment thereof and interest; this was held to authorize a sale to raise the 15,000*l.*

Implied
authority
to insert.

And the insertion of a power of sale may be authorized by necessary inference.

In *Williams v. Carter*, Sug. Pow. 945, 839, money was vested in trustees on the trusts of a marriage settlement, and the husband covenanted to settle after-acquired property of his wife, whether real or personal, on the trusts and subject to the powers of the settlement. The settlement contained the ordinary power to vary investments. Real estate subsequently became subject to the covenant, and it was held that a power of sale should be inserted in the settlement made thereof; and see *Scott v. Steward*, 27 B. 367; *Elton v. Elton*, 27 B. 634.

In *Tait v. Lathbury*, 1 Eq. 174, a settlement of personality contained a power of sale of the trust funds, and of investment of the proceeds in realty, which was to be conveyed to the use of the trustees upon such trusts [as would best correspond with the then subsisting trusts thereinbefore declared, and such real estate, when so purchased, was to be considered as personal estate for the

purposes of the settlement and go accordingly. There was no express power of sale over the real estate to be so purchased, and no power to give receipts. It was held that the trustees were intended to have both these powers.

In *Tait v. Lathbury* and in *Turner v. Sargent*, (*ante*, p. 449), it was held that not merely was a power of sale to be inserted, but a power to give receipts also. In *Cox v. Cox*, 1 K. & J. 251, a testatrix declared that every tenant for life or in tail under her will should have such and the like powers of leasing, selling, and exchanging any part of her estate as were by her father's will given to the tenants for life or in tail under his will or to the trustees thereof. It appeared that her father's will did not give the tenants for life or in tail any powers, but gave the trustees full power to sell and exchange and to give receipts. It was held that the tenants for life and in tail under the testatrix's will had power to sell, but, under the circumstances of the case, had not power to give receipts. The power of giving receipts is a power separate from powers of sale. It is a power by no means inserted as of course in legal instruments; it is often excluded, and, where excluded, it has never, except under very special circumstances, been held to be capable of being implied. The difficulties which would be met with in exercising such a power of sale, might be met by paying the money into Court under the Trustee Relief Act (10 & 11 Vict. c. 96).

It is now enacted by 22 & 23 Vict. c. 35, s. 23, that the *bonâ fide* payment to and the receipt of any persons to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security. This

Power to
give re-
ceipts.

22 & 23
Vict. c. 35.

act only applies, it seems, to instruments executed since the 13th August, 1859.

23 & 24
Vict. c.
145.

By 23 & 24 Vict. c. 145, s. 29, it is enacted that the receipts in writing of any trustees or trustee for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof. The act only applies to instruments executed after the Act (s. 34.)

Form of
the power.

2. The questions what words are sufficient to create, and what to execute powers, have been already considered (Creation and Execution of Powers, *ante*). The powers now referred to are those ordinarily inserted in instruments of settlement. With regard to powers of sale of estates limited to uses, it is not necessary to give express powers of revocation and new appointment; in whatever form the power be given, it will operate as a power of revocation and new appointment, and may be executed accordingly. (Sug. Pow. 837.) Although the power goes on to authorize or direct a conveyance "to the purchaser, his heirs, and assigns," the estate may be conveyed in any manner or to any uses the purchaser pleases. (*Ibid.* 838; and see Davidson, iii. 457.)

Conversion.

A power of sale, as distinguished from a trust for sale, does not operate as a conversion of property. The direction to sell must be imperative in order to operate as a conversion. (*Fletcher v. Ashburner*, 1 W. & T. L. C. 741); but if it be exercised, the property will be converted accordingly, unless there be a trust declared of the proceeds sufficient to reconvert it. (*Walter v. Maunde*, 19 Ves. 424; *De Beauvoir v. De Beauvoir*, 3 H. L. C. 524; *Greenway v. Greenway*, 29 L. J. Ch. 601. Sug. Pow. 856.)

3. The donees of these powers are within the terms of their power, if they exercise them without improper motives, and in the exercise of a reasonable discretion. If they have the usual power to sell and re-invest the proceeds in land, it is not absolutely essential that they should have an immediate re-investment in land in view—at any rate, where the settlement contains the usual clause for interim investments.

Duties of donees.

In *Mortlock v. Buller*, 10 Ves. 309, Lord Eldon said that the object of sales of this nature must be to invest the money in the purchase of another estate to be settled to the same uses: and the trustees are not to be satisfied with probability upon that: but it ought to be with reference to an object at the time supposed practicable; or, at least, the Court would expect some strong motive of family prudence justifying the conversion, if it is likely to continue money. Lord St. Leonards points out that the settlement in this case contained no clause for interim investment. (Sug. Pow. 863.) And even so, Lord Eldon does not lay down as an absolute proposition that under the ordinary power of sale and exchange, trustees can in no case sell, except with a view to a contemplated re-investment in land. He only says that a very special case must exist to justify such a course. (See 7 Ha. 438.)

But trustees must act reasonably and without improper purpose.

In *Marshall v. Hadden*, 4 De G. & Sm. 468, 7 Ha. 428, a mortgagee of settled estates required either to be paid off or to have the amount of his interest increased. The tenant for life proposed a new mortgagee at the same rate; but the trustees insisted on being the proper persons to carry the transaction into effect, and procured another mortgagee, but at a higher rate of interest; and in order to raise the expenses thereby incurred, proceeded

to sell the estate under the ordinary powers of sale and exchange in the settlement. On a bill filed by the tenant for life, the Court held that the trustees' conduct was unjustifiable and condemned them in costs.

It is not safe to accomplish indirectly under a power what the power does not authorize to be done directly. (Sug. Pow. 867, *ante*, Ch. X.) But it seems the better opinion that when the power of sale contains the usual clause authorizing the proceeds to be applied in discharge of incumbrances, they may be applied in paying off charges under long terms, such as portions, as well as charges affecting the inheritance. Davidson, iii. 463.

Improvident contract.

If trustees enter into an improvident contract, it will not be cancelled, but the Court will not execute it. (*Turner v. Harvey*, Jac. 178.)

Sale by auction.

Under a power in a mortgage to sell either by public auction or private contract for the best price in money that could be reasonably obtained, a valid sale by private contract may be made, although the property has not been put up or advertised for sale by auction, if the price is reasonable. (*Davey v. Durrant*, 1 De G. & J. 535.)

Power of sale does not authorize a gift.

But the same power was held to be not well exercised by an arrangement by which part of the mortgaged premises was valued and conveyed to the trustees of a charity at the price settled by the valuer, but no money ever passed, the mortgagee in fact presenting the charity with the amount: the sale was set aside, as being colourably and fictitiously made, though, in the opinion of the Court, not with any dishonest intention: it was, in fact, a gift and not a sale. (*Ibid.*)

Sale in consideration of rent-charge.

And it seems that the ordinary power of sale and exchange, where the money is to be invested in the purchase of other messuages, tenements, or hereditaments, to be conveyed to the same uses, does not authorize a sale in consideration of a rent-charge. (*Read v. Shaw*, Sug. Pow.

953; and see 19 & 20 Vict. c. 120, s. 12). Lord St. Leonards (Pow. 864) remarks on this that, although a rent-charge may be held to be an estate of inheritance in fee simple within a covenant to settle such an estate, yet where a landed estate is settled with the usual powers of sale and exchange, it would be contrary to the meaning of the power to substitute a mere rent-charge for the territorial possession. However, in *Re Peyton*, 7 Eq. 463, where real estates were settled, and there was the usual power to sell and invest the proceeds in the purchase of other manors, lands, or hereditaments, to be situate in England or Wales, of a clear and indefeasible estate of inheritance in fee simple in possession, the Master of the Rolls held that the settlement authorized an investment in freehold ground rents. And the donees of a power of sale and exchange may pay or receive money for owelty of exchange, although not expressly authorized to do so. (*Bartram v. Whichcote*, 6 Sim. 86; and see 23 & 24 Vict. c. 145, s. 1.) But when the estates are legal and the power of exchange is limited to exchange for land of at least equal value, if that value is not obtained in the exchange, the exchange is void at law, and equity will not interfere. (*Ferrand v. Wilson*, 4 Ha. 385.)

Owelty of exchange.

Trustees, who have a power of sale at the request and by the direction of the tenant for life, have a discretion in complying or refusing to agree to a request by the tenant for life to sell, and the Court will not control such discretion. (*Thomas v. Dering*, 1 Keen, 729); although if a bill be filed, the Court will inquire into the acts which have been done, and require the trustee to exercise his discretion under the view of the Court. (*Costabadie v. Costabadie*, 6 Ha. 410; *ante*, p. 102.)

Discretion of trustees to consent.

Where by the terms of a devise or settlement, the consent of the tenant for life is necessary to enable the trustees to sell, on a bill filed by the trustees to compel

Consent to be given before bill for specific perform-

ance filed
by trustees.

specific performance of a contract for sale, the plaintiffs, in order to obtain a decree for specific performance at the hearing, must prove that the requisite consent was given before the filing of the bill. It is not sufficient, for the purpose of obtaining an immediate decree, to prove that such consent was given before the hearing. The contract, of which specific performance is sought, must have been complete in all its essential parts before the filing of the bill. (*Adams v. Broke*, 1 Y. & C. C. C. 627.)

Rights of
purchaser.

And where a person sells property which he is neither able to convey nor to compel other proper parties to convey, the purchaser may repudiate the contract, and is not bound to wait to see if the vendor can induce some third person to join in making a good title. (*Forrer v. Nash*, 35 B. 167; and see *Dart*, V. & P. 4th Ed. 971.)

Power of
sale or ex-
change does
not autho-
rize parti-
tion.

4. As a general rule, a power of sale or exchange does not authorize a partition. (*McQueen v. Farquhar*, 11 Ves. 467; *Attorney-General v. Hamilton*, 1 Madd. 214.)

In *McQueen v. Farquhar*, Lord Eldon, both during the argument and still more emphatically in the judgment, expressed his opinion that a power of *exchange* did not include or authorize a partition. The only point, however, actually decided was that a power of sale did not authorize partition.

In *Brassey v. Chalmers*, 16 B. 228, Lord Romilly considered the clear effect of *McQueen v. Farquhar* to be, that if *Abel v. Heathcote* (2 Ves. jun. 98) should be thought to sanction the doctrine either that a power of exchange or a power of sale, *expressed in ordinary terms*, authorizes partition, that doctrine is not to be supported, and that it is in truth overruled by and is inconsistent with the decision in *McQueen v. Farquhar*. (This part

of the case was not affected by the appeal. 4 De G. M. & G. 528.)

But there may be cases where, on the whole context of the instrument creating the power, it may appear that the intention was that the power of sale and exchange should extend to partition. Evidence of intention:

In *Bradshaw v. Fane*, 3 Drew. 534, the power was to make sale and dispose of and convey in exchange, and the powers to revoke and limit new uses also referred to disposition, and the declaration as to the application of the money to be obtained referred in terms to *partition*, it was held that on the whole context the settlor intended the power to be in effect a power of partition as well as of exchange.

It seems, too, that under the ordinary power of sale, a partition might be effected by selling the undivided portion and purchasing with the proceeds the portion required. (*Attorney-General v. Hamilton*, 1 Madd. 223; and *cf. Dicconson v. Talbot*, 6 Ch. 32, at p. 39.)

But a power of sale and exchange will (semble) authorize an enfranchisement. (Dart, V. & P. 4th Ed. 70; and *cf. Re Adair*, 16 Eq. 124.) Enfranchisement.

5. A power of sale out and out, for a purpose or with an object beyond the raising of a particular charge, does not authorize a mortgage; but where it is for raising a particular charge and the estate itself is settled or devised, subject to that charge, it may be proper to raise the money by mortgage, and the Court will support it as a conditional sale, as something within the power and as a proper mode of raising the money. (*Stroughill v. Anstey*, 1 D. M. & G. 635.) When a power of sale authorizes a mortgage.

In that case the Lord Chancellor (St. Leonards) said, that in a case where trustees have a legal estate, and are to perform a particular trust through the medium of a sale, although a direction for a sale does not properly authorize a mortgage, yet where the circumstances would justify the raising of a particular charge by mortgage, it must be in some measure in the discretion of the Court whether it will sanction that particular mode or not. It may be the saving of an estate, and the most discreet thing that can be done: and as the legal estate would go, and as the purposes of the trust would be satisfied, it was impossible for the Court to lay down that in every case of a trust for sale to raise particular sums, a mortgage might not under the circumstances be justified. As a general rule, however, there could be no difficulty in saying that a mortgage under a mere trust for conversion out and out is not a due execution of that trust. And see *Haldenby v. Spofforth*, 1 B. 390; *Page v. Cooper*, 16 B. 396. In *Mills v. Banks*, 9 P. W. 9, the Lord Chancellor said that a power to sell implied a power to mortgage, which is a conditional sale.

In *Bennett v. Wyndham*, 25 B. 521, a testator devised real estates to trustees in fee, upon trust out of the rents, issues, and profits thereof to pay two annuities, and by the same ways and means, or such other ways and means (except a sale or sales), as they might think proper, to raise money to pay off certain charges. The Master of the Rolls thought that the word "sale" expressly excluded the possibility of raising the money by sale of any portion of the estate, and that the word "sale" virtually included within it the word "mortgage," which was practically a sale, and could not be resorted to without giving the mortgagee a power of getting possession of the estate, if the charge were not paid off when required.

6. A power of sale in a mortgage may, if exercised *bonâ fide*, be validly exercised by a sale for a sum, part of which is allowed by the mortgagee to remain on mortgage at his own risk: (*Davey v. Durrant*, 1 De G. & J. 535; *Thurlow v. Mackeson*, L. R. 4 Q. B. 93.)

Execution
of power of
sale in
mortgage.

In *Davey v. Durrant* there was the usual power, but a clause was added providing that all arrangements, sales, &c., made by the mortgagee should be as valid and effectual without, as the same would be with, the concurrence of the mortgagor. The mortgagee agreed to sell the mortgaged premises, and it was by the *same instrument* further agreed that part of the purchase-money (seven-twelfths) should remain on mortgage of the said premises. It was objected that the power did not authorize the mortgagee to permit part of the purchase-money to remain outstanding when he sold. But L. J. Knight-Bruce held that it is not beyond the right or authority of a mortgagee, with a power of sale, to effect a sale of which one of the terms shall be that even a considerable portion of the purchase-money shall be allowed to remain on mortgage of the property, that mortgage being, as between the seller and those entitled to the equity of redemption, at the seller's risk; that is, he charging himself with the whole amount of the purchase-money in account with them, as had been done in the case before the Court. The L. J. Turner rested his decision on the clause above referred to with regard to the mortgagor's concurrence.

In *Thurlow v. Mackeson*, the contract for the sale was a separate and distinct instrument, and no trace of the arrangement that part of the purchase-money should remain on mortgage appeared on it. The transaction was

held to be valid, being in fact, a sale by the mortgagee under his power and a mortgage back to him.

There may of course be collusive sales; but in the absence of collusion or fraud, there is nothing in the terms of an ordinary power of sale in a mortgage to prevent a sale by the mortgagee, allowing part of the purchase-money to remain on mortgage at his own risk. And see Sug. V. & P. 14th Ed. 66; Dart, V. & P. 4th Ed. 70.

Tenant for life whose consent is required may buy.

7. Where a power of sale is given to trustees, to be exercised at the request or with the consent of the tenant for life, the trustees may sell to him as they may to anyone else; and if the property is sold at a fair price, the purchaser's motives for buying it cannot affect the case. (*Howard v. Ducane*, T. & R. 81; *Dicconson v. Talbot*, 6 Ch. 32.)

The ground of the rule is that the power of consenting to, or requesting an exercise of the power of sale, is given to the tenant for life for his own benefit, and that he is not in a fiduciary position as to it. (*Ibid.* 37.)

The tenant for life is not, however, in the same position as a stranger as to the obligation to communicate what he knows. He may, by reason of his peculiar opportunities of obtaining information, be under some obligation to communicate circumstances which he knows, and which he knows that the trustees do not know. (*Ibid.* 38.)

Where he is sole donee of power.

It does not seem settled, however, whether, if the tenant for life were himself the sole donee of the power, he could purchase from himself; it would seem that he could not. The general rule in equity is that a man cannot place himself in a situation in which his interest conflicts with his duty. In *Grover v. Hugell*, 3 Russ. 428,

the Master of the Rolls refused to enforce specific performance of a contract, where the title was derived from an incumbent, who had sold part of the glebe for the redemption of land tax to a purchaser in trust for himself. The duty of the rector was, to obtain the best possible price for the land sold, and his interest as purchaser was, to pay the least possible price for it. The sale in that case was required to be by public auction, and before two of the commissioners or some person authorized by them; and their approbation of the sale was required; these requirements appeared to have been fulfilled.

In *Beaden v. King*, 9 Ha. 499, the question arose under the statute 42 Geo. 3, c. 116, giving power to prebendaries to sell: the Vice-Chancellor said (p. 519), "I agree that where a power of sale is given without restriction, to a party having a limited interest only, it may well be held that the power to sell imports a negative upon the power to buy, because the power to sell is in the nature of a trust, and it is obvious that the party who is interested to sell, cannot in such a case safely be permitted to buy. This rule, I think, may be carried further; that a restriction put upon the power of sale will not, in all cases, authorize the party, to whom the power to sell is given, to become the purchaser of the estate which is the subject of the power; but I am not prepared to hold that in no case would this Court permit the party who has the power to sell, to become the purchaser of the estate to be sold under the power; and it would be contrary to authority so to lay down the rule. I think it must in each case depend upon the circumstances under which, and the purposes for which, the power was given, and upon the nature and extent of the restrictions which are put upon the exercise of the power. The objections which, in the case of an unrestricted power, apply with so much force

to the donee of the power being permitted to buy, certainly do not apply with the same force in the case of a restricted power. In proportion as the power is restricted, the dangers incident to allowing the donee to purchase are diminished." In the case before the Court, the Lords Commissioners had an absolute veto on the sale, and (s. 74) might require to be furnished with all information which the donee of the power might possess.

Power to
raise
money.

In *Greenlaw v. King*, 3 B. 49, a rector was empowered by Act of Parliament, with consent of his Bishop, who was patron of the living, to raise money by annuity to build a new house, the plan and accounts of which were to be approved by the Bishop. The Bishop advanced the money himself, and obtained an annuity charged on the living; although there was no unfairness, the transaction was set aside.

And Lord Eldon's remark (T. & R. 86) that "there must be a diligent attention on the part of the trustees to see that they get a reasonable price," seems incompatible with holding that a tenant for life, with an unrestricted power of sale, can sell to himself.

Lease by
tenant for
life to him-
self.

On the other hand, in *Wilson v. Sewell*, 4 Burr. 1979, a building lease made under a power by a tenant for life was upheld, although it was granted to a person in trust for the tenant for life himself. See, too, *Montague v. Cardigan*, Sug. Pow. 918,

By mort-
gagor to
himself.

On the same principle, in *Bevan v. Habgood*, 1 J. & H. 222, it was held that a mortgagor, to whom, until entry by the mortgagee, a power of granting building leases was reserved, might make a lease to a trustee for himself. The Vice-Chancellor said, "The matter reduces itself to this, (which but for the authorities on the analogous case of tenant for life and remainderman would be a very grave question) whether under a power to grant leases at the best rents and subject to other restrictions, the mortgagor

can make a valid bargain, being himself the person with whom the bargain is in substance made. The authorities decide that such a bargain may be made by a tenant for life, the ground being that the estate gets all the benefit to which it is entitled. This assumes the honesty of the tenant for life, and it comes to this: that in this particular class of cases, the Court does not hold by its general doctrine, which prohibits an agent from contracting for his own benefit as against his principal. Actual fraud would, of course, be material.

It has been held (*Otter v. Vaux*, 2 K. & J. 650, 6 D. M. & G. 638), that a mortgagor cannot purchase from a first mortgagee under his power of sale so as to affect the second mortgagee, the mortgagor's duty being to pay off the first mortgage, the power of sale under which could only arise on his default; he could not therefore take advantage of his own default to purchase the estate under the power to the prejudice of the second mortgagee.

Mortgagor may not buy from first mortgagee to detriment of second mortgagee.

The rules of the Court on the subject of sales to themselves by persons standing in fiduciary relations to the persons interested, are thus stated by L. J. Giffard (*Guest v. Smythe*, 5 Ch. 551-556): "A person who has the conduct of a sale under the direction of the Court cannot buy; and, of course, as he cannot buy, his solicitor cannot buy. Parties to the suit cannot buy without the special leave of the Court; and because they cannot buy, their solicitor also cannot buy. A trustee for sale, an assignee under a bankruptcy, or the solicitor of an assignee cannot buy; and, generally speaking, where a man's duty and interest in respect of the purchase conflict, he cannot become a purchaser." [Dart, V. & P. 4th ed. 24 *et seq.* And see *Fox v. Mackreth*, 1 W. & T. L. C. 137.

Rules of the Court as to sales by persons in fiduciary positions.

An executor who renounces, can at law purchase the testator's real estate, over which the executors have a power of sale; the validity of the sale in equity would

depend on the circumstances of the case. (*Mackintosh v. Barber*, 1 Bing. 50.)

It is settled that a married woman, donee of a power of leasing, cannot demise to her husband; it is a power of such a nature as to require a bargain between independent persons, and a grant which is not void at law. (*Doe d. Hartridge v. Gilbert*, 5 Q. B. 828.)

As to sales of reversions, see *ante*, p. 126; as to accelerating the event on which powers are to arise, *ante*, p. 124; and as to sales of land apart from timber or minerals, *ante*, pp. 291, 292.

8. There are two important enactments relating to powers of sale, which may be here noticed.

19 & 20
Vict.
c. 120.

By 19 & 20 Vict. c. 120, s. 11 (amended 21 & 22 Vict. c. 77), it is provided that "it shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in the Act contained, from time to time to authorize a sale of the whole or any part of any settled estates or of any timber (not being ornamental timber) growing on any settled estates; and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the Court for the time being is or shall be required in the sale of lands sold under a decree of the Court." For the practice under this Act, see *Morgan Ch. Acts and Orders*, 4th ed. 236, and *Daniel Ch. Pr.* 5th ed. 1832.

Indefinite sales will not be ordered, *Re Peacock*, 15 W. R. 100. But mines may be ordered to be sold apart from the surface, *Re Mallin*, 30 L. J. Ch. 929; 3 Giff. 126.

And where the property to be sold comprises copy-

holds as well as freeholds, the Court may direct the former to be enfranchised before sale. (*Re Adair*, 16 Eq. 124.)

Sect. 15 enacts, that on every sale or dedication to be effected as thereinbefore mentioned, the Court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate, if necessary, by way of revocation and appointment of the use, or otherwise as the Court shall direct. The order of the Court under this section binds all the estates and interests which the parties have, and every interest they can acquire before they make the conveyance. In *Eyre v. Sanders*, 28 L. J. Ch. 439, real estate subject to a mortgage was devised in strict settlement, and a power of sale was given to trustees; a suit was instituted, and the Court ordered the estate to be sold, and appointed A. B. and C. to execute the conveyance, and it was declared that the mortgagees should be bound by the order. The legal estate was, after the order, reconveyed to the trustees of the will. It was held that A. B. and C. could convey it, and that the trustees were not necessary parties to the deed.

Persons directed to convey.

Sect. 26 enacts, that the Court may execute the powers given by the Act from time to time as occasion may require, but precludes their exercise when the settlor either expressly or by necessary implication negatives such exercise. It has been held, however, that the insertion of a power of sale does not indicate any intention to exclude the powers of the Court. (*Re Thompson*, John. 418.)

Exclusion of powers given by the Act.

Sect. 28 provides that the acts of the Court in professed pursuance of the Act shall not be invalidated. A purchaser obtains by a conveyance under the Act an indefeasible title, except against persons beneficially interested

Indefeasible title under sale by Court.

whose concurrence has not been obtained, although the estate is not a settled estate. (*Re Shepherd*, 8 Eq. 571 ; *Re Thompson*, John. 418.)

Infants and lunatics.

Sect. 36 provides that all powers given by the Act, and all applications and consents on behalf of infants and lunatics shall be exercised, made, and given by their guardians and committees, and as to bankrupts by their assignees ; but a special application is necessary in case of infants and lunatics ; and in the case of lunatics, the leave of the Court in Lunacy must also be obtained. (*Re Woodcock*, 3 Ch. 229.)

The committee who is to exercise the powers must be properly appointed ; a guardian on behalf of a person of unsound mind not so found, is not enough. (*Re Clough*, 15 Eq. 284.)

23 & 24
Vict. c.
145.

9. By 23 & 24 Vict. c. 145, after reciting that it is expedient that certain powers and provisions usually inserted in settlements, mortgages, and wills and other instruments, should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument, it is enacted that in all cases where by any will, deed, or other instrument of settlement it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally or in any particular event, over any hereditaments named or referred to in or from time to time subject to the uses or trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to exercise such power of sale by selling such hereditaments either together or in lots, and either by auction or private contract, and either at one time or several times, and (in case the power shall expressly authorize an exchange) to exchange any hereditaments which for the time being shall be sub-

Sales may
be by
auction or
private con-
tract.

ject to the uses or trusts aforesaid for any other hereditaments in England or Wales or in Ireland (as the case may be), and upon such exchange to give or receive any money for equality of exchange.

By sect. 2 it is provided that it shall be lawful for the persons making any such sale or exchange to insert any such special or other stipulations either as to title or evidence of title, or otherwise, in any conditions of sale or contract for sale or exchange, as they shall think fit; and also to buy in the hereditaments or any part thereof at any sale by auction; and to rescind or vary any contract for sale or exchange; and to resell the hereditaments which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby; and no purchaser under any such sale shall be bound to inquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other hereditaments or otherwise.

Sales may be made under special conditions.

Upon sales by trustees, mortgagees, and other persons filling a fiduciary character, great care is requisite in the use of special conditions, since, if improperly used, they may not only involve the vendors in personal liability to their *cestui que trust*, &c., but also prevent their making a good title. In order to have this effect, the conditions must be unnecessary, and of such a depreciatory character that their use amounts to a breach of trust. (Dart, V. & P. 157; *Dance v. Goldingham*, 8 Ch. 902.) The Act would not of course aid conditions which amounted to breaches of trust.

For the purpose of completing any such sale or exchange as aforesaid, the persons empowered to sell or exchange as aforesaid shall have full power to convey or otherwise dispose of the hereditaments in question either

Vendors authorised to convey.

by way of revocation and appointment of the use or otherwise as may be necessary (s. 3).

Investment
of purchase
moneys.

The moneys received from sales or for equality of exchange are to be laid out either as provided by the instrument containing the power, or if there is no such provision, in the purchase of other lands to be settled to the same or the like uses (s. 4); or in payment off of incumbrances (s. 5).

Locality of
land to be
purchased.

Purchase-money is to be laid out in, and exchanges made for, land in England and Wales or land in Ireland, according to the locality of the land sold or given in exchange (s. 6).

Trustees of renewable leaseholds may renew (s. 8), and in case any money shall be required for the purpose of paying for equality of exchange, or for renewal of any lease, the persons effecting such exchange or renewal may pay the same out of any moneys in their hands in trust for the *cestuis que trust*, or may raise the amount by mortgage (s. 9). But no sale or exchange or purchase shall be made without the consent of the person appointed to consent by the instrument of settlement, or if there be no such person, without the consent of the tenant for life, if *sui juris* (s. 10).

Part II. of
Act —
Powers of
mortga-
gees.

Where any principal money is secured or charged by deed on any hereditaments of any tenure or any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators, and assigns shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the power, have the following powers,

to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely (i.), a power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and resell the property from time to time in like manner. (ii.) A power to insure and keep insured from fire the whole or any part of the property, whether affixed to the freehold or not, and to add the premiums to the principal secured at the same rate of interest. (iii.) A power to appoint a receiver as thereafter mentioned (s. 11).

The receipts for purchase-money given by the person or persons exercising the power of sale by the Act conferred, shall be sufficient discharge to the purchasers, who shall not be bound to see to the application of their purchase-money (s. 12). Six months' notice must be given before sale, but the purchaser's title is not to be impeached on the ground of want of notice (s. 13). The 14th section regulates the application of the purchase-money. The 15th provides that the person exercising the power of sale shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein which the person who created the charge had power to dispose of, except that in the case of copyholds, the beneficial interest only shall be conveyed to and vested in the purchaser by such deed. The person entitled to exercise the power of sale may call for the title deeds and the conveyance of any outstanding legal estates (s. 16).

Receipts of
vendors.

Notice of
sale.

Power to
convey.

Sects. 17 to 23 relate to the appointment of receivers.

The powers and provisions contained in Part II. of the Act relate only to mortgages or charges made to secure

money advanced or to be advanced by way of loan, or to secure an existing or future debt (s. 24).

Part III. of the Act contains provisions as to investment of trust funds, appointment, and powers of trustees and executors, &c.

Execution of powers notwithstanding incumbrances.

Part IV., s. 31, provides that for the purposes of the Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of land or personal property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipts of the rents and income as aforesaid, unless they shall concur therein.

Powers may be negatived.

None of the powers or incidents by the Act conferred or annexed to particular offices, estates, or circumstances shall take effect or be exerciseable if it is declared in the instrument creating such offices, estates, or circumstances that they shall not take effect; and where there is no such declaration, then if any variations or limitations of any of the powers or incidents by the Act conferred or annexed are contained in such instrument, such powers or incidents shall be exerciseable or shall take effect only subject to such variations or limitations (s. 32).

Extent of powers given by Act.

Nothing in the Act is to empower any person to deal with or affect the estates or rights of any person soever, except to the extent to which they might have dealt with or affected the estates or rights of such persons if the instrument under which such persons are empowered to act had contained express powers for such persons so to deal with or affect such estates or rights (s. 33).

The Act extends, except as thereinbefore otherwise provided, only to persons entitled or acting under a deed, will,

codicil, or other instrument executed after the passing of the Act, or under a will or codicil confirmed or revived by a codicil executed after that date (s. 34).

Lord St. Leonards says that he is unable to discover anything to which the exception can relate, and it would not be safe to consider the provision as restricted by the exception. (Pow. 878.)

CHAPTER XVII.

POWERS OF LEASING.

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Nature of powers of leasing.

1. THE principles applicable to other powers apply equally to powers of leasing.

The power is to be exercised for the benefit of the estate; but the lessee is a purchaser *pro tanto* and is entitled to be relieved, as are other purchasers, against defects in the execution of the powers. (See *ante*, p. 279, *et seq.*) The remainderman has no remedy against the lessee except such as may arise out of an imperfect or improper execution of the power. "There is no case to be found in our books in which a lease, conformable to the literal tenor of the words in which the power is

given, has been held invalid at law, on the ground of any supposed or real hardship thereby inflicted on the remainderman: and it would be strange if such a case could be found, for as the remainderman takes what is given to him subject to the power, he must take the advantage *cum onere*, and has no reasonable ground of complaint if that should happen which the framer of the power, who had the *jus disponendi*, contemplated." *Per* Baron Alderson, 1 H. L. C. 576.

The aid afforded to lessees under powers defectively executed has been greatly extended by the Legislature, 12 & 13 Vict. c. 26, and 13 & 14 Vict. c. 17. These enactments have been already considered, *ante*, p. 285, *et seq.*

It may be here stated that the enactments 32 Hen. 8, c. 28, and 10 Car. 1, sess. 3, c. 6, Irish, as to leases made by tenants in tail and ecclesiastical persons, except so far as relates to leases made by persons having an estate in right of their churches, have been repealed by 19 & 20 Vict. c. 120, s. 35.

2. Before the statutes 12 & 13 Vict. c. 26, and 13 & 14 Vict. c. 17, no acceptance of rent by a remainderman could set up a void lease granted under a power.

Leases before and not falling within 12 & 13 Vict. c. 26 and 13 & 14 Vict. c. 17.

"When a lease made by a tenant for life is void as being bad from not conforming to a power, nothing done afterwards will amount to a confirmation. When it is voidable only, acceptance of rent with other circumstances may be a confirmation: acceptance of rent and standing by while improvements were making, would be material; but if leases are void, there is no case either in law or equity by which compensation for improvements can be compelled." *Bowes v. East London Waterworks*, Jac. 324, 331; *Robson v. Flight*, 4 D. J. & S. 608;

and as to the distinction between void and voidable leases see *ante*, p. 290. And if the remainderman have only a limited interest, no acts of confirmation of a voidable lease by him can bind those in remainder after him. (Jac. 324.)

Acceptance
of rent.

But acceptance of rent as such, or of any service reserved by the lease, operates as an admission by the remainderman that the lessee is his tenant, and entitles him to notice to quit. (*Doe v. Watts*, 7 T. R. 83; *Doe v. Tanriere*, 12 Q. B. 998; *Doe v. Morse*, 1 B. & Ad. 365.)

Trustees.

It has been seen that if the lessee has both an interest and a power, a lease which does not comply with the terms of the power will take effect out of the interest, and so be good. But if the estate of the lessors be absolute at law, so that they could make a good lease at law, yet if they be trustees, and the lease is an abuse of their trust, it will be invalid. (*Bowes v. East London Waterworks*, Jac. 324.)

Tenant on
terms of
agreement.

The general rule is that, if a party occupy and pay rent under an agreement for a term, then although such agreement may not operate to create the proposed term, either in consequence of its not amounting to a lease (*Richardson v. Giffard*, 1 A. & E. 52), or not being a good execution of a power (*Beale v. Sanders*, 3 Bing. N. C. 850), yet the party so occupying and paying rent is considered as holding upon all the terms of the agreement not inconsistent with a tenancy from year to year, such as the obligation to repair and the like. (2 Sm. L. C. 99.) Accordingly, where a lease not warranted by a power and containing a perpetual covenant for renewal is granted by a tenant for life, the reversioner does not, by accepting for many years after he comes into possession the rent reserved upon the lease, confirm it so as to make the covenant for renewal binding upon him. (*Higgins v. Rosse*, 3 Bl. 112.)

Usual
powers.

3. Powers of leasing appear to be "usual powers"

within the meaning of a direction to make a settlement with all usual powers. (*Hill v. Hill*, 6 Sim. 136; *Scott v. Steward*, 27 B. 367.)

In *Duke of Bedford v. Marquis of Abercorn*, 1 M. & C. 312, the articles contained a stipulation that the intended settlement, which related to estates in Ireland, should contain all the covenants, provisions, and conditions usually contained in marriage settlements in England. The Lord Chancellor directed a reference to enquire whether the powers of leasing proposed to be introduced were usual powers in the part of Ireland in which the estates were situated, and whether there were any circumstances connected with the property which might render it expedient and for the interest of all parties that such powers should be introduced, with liberty to state special circumstances.

But if leases for a particular term be mentioned, the Court will not infer from general words that larger powers were intended to be inserted.

Building lease where ordinary lease is specified.

In *Pearse v. Baron*, Jac. 158, the articles provided that the settlement should contain a power of leasing for twenty-one years in possession, a power of sale and exchange, of appointing new trustees, and all such other powers, provisions, clauses, covenants, and agreements, as are usually inserted in settlements of a like nature. The Master of the Rolls held that the general words were of no effect as opposed to the mention of a particular term of years for which there was to be a power of granting leases, and he refused to allow the introduction of a power to grant building leases for longer terms; and cf. *Brewster v. Angell*, 1 J. & W. 625.

If a settlement contain no power of leasing, trustees of the settled estates cannot grant valid leases, although they have the legal estate, except under the provisions of the Settled Estates Act. *Re Shaw*, 12 Eq. 124;

Where there is no power.

Ward v. Patterson, 10 B. 541; *Naylor v. Arnott*, 1 R. & M. 501, is not followed. And an express trust for sale in a will is inconsistent with any implied power to grant leases. (*Evans v. Jackson*, 8 Sim. 217.)

4. No lands can be leased under a power except such as are specified as subject to the power.

What lands
may be
leased
under
powers.

This question appears to be unaffected by 12 & 13 Vict. c. 26, and 13 Vict. c. 17: for if the lands demised are not comprised in the power, those acts cannot apply: their scope is to aid defects in the execution of, not to create new, powers. But it must be remembered that tenants for life and other persons with limited estates created since 19 & 20 Vict. c. 120, have powers of leasing given them by that Act, s. 32, *post*.

Powers of leasing in settlements commonly extend to all or any part of the settled property, though not unfrequently the mansion-house, gardens, and park are excepted out of the power: and sometimes they form the subject of a special leasing power for a short term only, as for three or seven years. (Davidson, iii. 390.)

Lands
usually
demised.

Particular expressions are, however, sometimes used, which limit the extent of the power: thus, lands "usually demised" may mean either lands frequently let, referring to repeated acts of leasing, or lands usually in lease, which would refer to the time during which the land had been let, and not to the acts of letting: either would appear to come within the meaning of lands usually demised (Sug. Pow. 728), although it has been said that lands which have been twice or thrice letten are within such a power, but lands once letten, though for a long term, are not (*ibid.*); and it would seem that the lands must have been in lease within twenty years previously to be within the power. (*Ibid.*, and see Co. Litt. 44 b.)

Generality
of power

The intention of the parties creating the power is in

each case to govern ; and general words may be limited accordingly. In *Baggot v. Oughton*, 8 Mod. 259, there was a family settlement of an estate, consisting of grounds always occupied with the mansion, and of lands let to tenants on rents reserved ; and there was a power to lease all or any part of the premises at such yearly rents or more, as the rents at which the same were then let. Lord Mansfield said that “the qualification annexed to the power of leasing, that the ancient rent must be reserved, manifestly excluded the mansion-house and lands about it never let. No man could intend to authorize a tenant for life to deprive the representatives of the family of the use of the mansion-house. The words in such a case show that the power is meant to extend only to what has been usually let. By that means the heir enjoys all the premises in the settlement, just as they were held by his ancestor, the tenant for life : he has the occupation of what was always occupied, and the rent of what was always let.”

limited to
carry out
the in-
tention.

So in *Pomery v. Partington*, 3 T. R. 665, a power to let all or any part of the premises so as the usual rents be reserved, did not authorize a lease of tithes which had never been let before. And see *Mountjoy's case*, 5 Rep. 3.

If the intention be clear that the power should extend to premises not before demised, the Court will uphold a lease of such premises.

When the
power in-
cludes
lands not
before let.

In *Walker v. Wakeman*, 2 Lev. 150, there was a power to demise the settled premises, so as 5s. per acre rent were reserved : a lease of tithes comprised in the settlement was held good, although the restriction was inapplicable to the subject of the demise. And see *Comberford's case*, 2 Roll. Abr. 262, pl. 15 ; *sed qu.* ; see these cases commented on, Sug. Pow. 734.

In *Winter v. Loveday*, 1 Com. 40, Lord Holt says, “ If a man hath a power reserved to him of making leases

of two things, and a qualification is annexed to the power which cannot extend to one of these things, he may make a lease of that thing without any regard to the qualification;" and he instances the case of a power to lease a manor of which some lands were and some were not let, at the usual rents; *sed qu.* It would be at any rate a clearer case if the power were to lease Blackacre and Whiteacre at the usual rents, and one had never been let: in such a case the express words would be too strong: see 1 Com. 574.

Joining or
separating
lands in
leases.

Under a power to lease any part of devised lands "usually so leased" so that there be reserved "the ancient and accustomed rents and heriots or more," a single lease of lands comprised in the power, but which had never before been comprehended in one demise, was held good; the Court being of opinion that "usually so leased" related to the time and duration of the lease, not to the joining or separating the premises. (*Doe d. Lord Egremont v. Stephens*, 6 Q. B. 208; *Doe d. Bartlett v. Rendle*, 3 M. & S. 99.)

Grant of an
easement
over lands
subject to
power but
not in-
cluded in
the demise.

It has been held that a power to lease the premises or any part thereof for 21 years, reserving the best yearly rent, with a condition for re-entry, &c., did not authorize a lease of part of the land, with liberty to sport over the rest: it was not a grant of the whole, for it contemplated that other parts were not leased: nor was it a grant of a part, for in the power, part is used with reference to the entirety which the tenant for life has. Thus, supposing the estate to consist of two houses and 1,000 acres, the power would enable the party to grant one house and 100 acres. But the demise must be of the whole which covers the part demised: an easement cannot be granted by itself out of any separate part; that would be subjecting the land to a servitude. *Dayrell v. Hoare*, 12 A. & E. 356. And it was argued in *Ricketts v. Bell*, (1 De G. &

Sm. 335,) that a power of leasing of this sort can only be exercised by demising an interest of such a nature that the rent reserved can be distrained for thereon. The lease in that case was of a way-leave; but the Vice-Chancellor did not refer to this point in his judgment, although he held the agreement in question *ultra vires*.

5. A power to lease lands, without mentioning mines, authorizes a lease of open but not of unopened mines: a power to lease lands with the mines, authorizes a lease of open, but not of unopened mines, if there be any open mines; but if there be none, it authorizes a lease of unopened mines. *Clegg v. Rowland*, 2 Eq. 160.

What will authorize a lease of mines.

This is a corollary of the general rule of law regarding waste, which is thus stated by Coke. "A man hath land in which there is a mine of coals or the like, and maketh a lease of the land (without mentioning any mines) for life or for years: the lessee for such mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any new mine that was not open at the time of the lease made, for that would be adjudged waste. And if there be open mines, and the owner make a lease of the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine. But if there be no open mine, and the lease is made of the land together with all mines therein, there the lessee may dig for mines and enjoy the benefit thereof; otherwise those words should be void." Co. Litt. 54 b.

In *Clegg v. Rowland*, there was a conveyance to trustees of lands together with the mines thereunder, and a power to lease for 14 years without mentioning mines, "so as none of the said demises or leases were made dis-

punishable for waste." This power was held to authorize a lease of open but not unopened mines.

Clause
against
waste re-
jected.

In *Daly v. Beckett*, 24 B. 114, lands with the mines and minerals thereunder were conveyed to trustees in strict settlement, and power was given to them to demise the hereditaments, and the coal and minerals, &c., but so as the lessees should not be made punishable for waste. The Master of the Rolls interpreted the power to be an express power to grant leases to work unopened as well as opened mines; but the terms of the prohibition were such as to prevent the lessee from committing waste, that is, from opening an unopened mine; he therefore concluded that there was so much contradiction in the clause which imparted prohibition against waste, that he rejected it altogether. And see *Morris v. Rhydydefed Colliery Company*, 3 H. & N. 473, 885, and *Campbell v. Leach*, Ambl. 740.

It is to be observed, however, that tenant for life, impeachable for waste, of estates which are settled "with all mines, &c." cannot work unopened mines, although they are included in the general words, and there are no open mines. (*Whitfield v. Benet*, 2 P. W. 240.)

Produce of
mines be-
longs to
tenant for
life.

Where there is the ordinary power to lease mines and minerals, the produce of the mines is made part of the annual profits of the estate, and whether in royalties or in whatever other way it is produced, it forms part of those profits, and is not to be treated like timber cut, where the produce of it is invested, and the interest only paid to the tenant for life. (*Daly v. Beckett*, 24 B. 123.) It is the same with royalties on open brickfields. (*Miller v. Miller*, 13 Eq. 263). As to timber, see *Honywood v. Honnywood*, 22 W. R. 749.

Duration of
lease.

6. The power to lease usually provides for the duration of such lease. If no term be mentioned, the general rule is that—

When a power is added to a life estate, the fair construction is that the power is different from and in excess of that which would have arisen as a mere accessory to the life estate. *Hele v. Green*, 2 Roll. Abr. 261, pl. 10.

But the general intention to be gathered from the instrument creating the power is the criterion.

In *Vivian v. Jagon*, L. R. 3 H. of L. 285, a testator devised his estates to his daughter for life without impeachment of waste, with remainders over. He gave her a power of leasing for 20 years, and also a power to work or make a lease of mines; the profits were to be paid over by his daughter to the trustees, and invested in land, the rents to be received by the daughter for life. This power was held only to authorize leases terminable with the daughter's life. The grounds of the decision were, that the testator could not have meant to empower his daughter to make unlimited leases, amounting to sales, of minerals, when he had carefully provided for the sale of his estates generally by means of trustees; the words "work or lease," being placed together, were to be construed *in pari materiâ*, and the power to work must have been co-extensive with her life: the payment over by the daughter, the investment by her, and the payment of the rents to her, pointed to the duration of her life, and the testator had clearly specified the persons in remainder when he spoke of the power of exchange which was to continue beyond the daughter's life, and to be exercised with consent.

An indefinite power of leasing will usually allow of leases for any period, however long. Indefinite
power of
leasing.

But in all cases, in order to determine what is the real meaning of the words of the power itself, it is competent

to the Court to look to the whole instrument in which it is found, and to examine and consider the consequences to the remainderman and to the other objects of the deed, for the purpose, if the words be ambiguous, of adopting that construction of them which may produce the least inconvenience and best harmonize with all the other provisions which the parties have thought proper to make. *Sheehy v. Muskerry*, 1 H. L. C. 576. In that case the power was to lease all, every, or any part or parts, parcel or parcels of the premises, for any time or term of years or lives, and with or without covenants for renewal; and in case of the determination of all or any of the aforesaid lease or leases respectively, to make new or other leases thereof in manner aforesaid, and with or without any fine or fines, as the donee should think fit. This power authorized leases for 999 years, with fines. In *Attorney-General v. Moses*, 2 Madd. 294, a power was given by Act of Parliament to a vicar, with consent of the vestrymen, to grant or demise certain waste ground as to them should seem meet. A lease for 999 years was upheld. There is, however, an exception to the rule that indefinite leasing powers will allow of leases for any term. In leases of charity estates, the Court considers whether there has been a prudent and provident execution of the trust, and if not, has held the lessee to be a trustee (*ibid.*). *Attorney-General v. Green*, 6 Ves. 452. It is in general laid down that when the trustees of a charity grant a lease of the property for a longer duration than is ordinarily consistent with its proper management, the lease will be set aside, unless the persons taking under it can show that it was, under the circumstances, a reasonable transaction. (Tudor, Char. Trusts, 307.) *Attorney-General v. Pilgrim*, 12 B. 57; *Attorney-General v. Hall*, 16 B. 388.

Exception
to last rule
in case of
charity
lands.

Power to

If one hath power to make a lease for three lives or

21 years, he cannot make a lease for 99 years determinable upon three lives ; but where the power is in the beginning absolute, affirmative, and indefinite, and then a proviso is added, so that such lease shall not exceed three lives or 21 years, a lease for 99 years determinable upon three lives may be made. *Whitlock's Case*, 8 Rep. 69.

lease for
three lives
or years.

A power to lease for any number of years not exceeding 21 years, or for the life or lives of any one, two, or three person or persons, so as no greater estate than for three lives be at any one time in being, authorizes either a chattel lease for years or a freehold lease for lives ; but not a lease for 99 years determinable on lives ; for that might exceed 21 years. *Roe d. Brune v. Prideaux*, 10 East, 157.

In *Long v. Rankin*, Sug. Pow. 895, the power was to demise for any term or terms of years not exceeding 31 years, or for one, two, or three lives, or for any term of years not exceeding 31 years, or number of lives not exceeding three lives. This was well executed by a lease for three lives and the survivor of them, or for 31 years, which should longest continue. In this case the term did not exceed that authorized by the power. And see *Commons v. Marshall*, 6 Br. P. C. 168.

In *Re Crommelin*, 1 Ir. C. L. 182, a power to lease for any term not exceeding three lives and 41 years was well executed by a lease for three lives and 41 years.

But where the power was to lease all or any part of the premises then let on leases for lives to any person for a similar term or estate, and at the same rents and under the same covenants at and under which the leases were then held, and part of the premises was let for two lives at the date of the creation of the power, a lease for three lives was held bad. *Jenner v. Morris*, 7 Jur. N. S. 385, 9 W. R. 566.

Inasmuch as *omne majus continet in se minus*, a power to lease for 21 years will authorize a lease for any

Power to
lease for
21 years

authorizes
a lease for
a smaller
term.

term of years not exceeding 21. The tenant for life may exercise his right to the utmost of his power, or he may stop short of that; and then every part of which he abridges himself will be for the benefit of the next in remainder: he throws back into the inheritance that portion which he did not choose to absorb for his own use. *Isherwood v. Oldknow*, 3 M. & S. 382. And he that has power to make leases for three lives may make leases for two lives; in either case he may create a less interest, *being of the same nature*, than the power mentions. (Sug. Pow. 746.)

When lease
may be de-
terminable
at lessee's
option.

A power to lease for any term of years not exceeding 21 years authorizes a lease determinable at the option of lessor or lessee. *Edwards v. Milbank*, 4 Drew. 606; and cf. *Sheehy v. Muskerry*, 1 H. L. C. 589, although a contrary opinion has been expressed in Ireland. *Lowe v. Swift*, 2 B. & B. 536; *Jack v. Creed*, 2 Hud. & Br. 128.

But if the power requires that the lease should be for a term *absolute* not exceeding 21 years, a lease determinable at the option either of lessor or of lessee seems to be not within the power. (Sug. Pow. 738.)

In *Muskerry v. Chinnery*, Ll. & Goo. 229, Lord St. Leonard says: "Where the transaction is *bonâ fide*, and the *terms of the power do not require the number of years to be absolute*, I see no reason for holding that a clause of surrender vitiates the lease. Many powers do require that the term to be granted shall be an absolute one—that is, *not determinable*."

Lease for
lives.

A lease under a power to lease for lives must be for lives *in esse*; and concurrent: in Lord Kenyon's words, the candles must be all burning at the same time. *Doe d. Wyndham v. Halcombe*, 7 T. R. 713. In *Clark v. Smith* (9 Cl. & Fin. 126) the power was for A. and all and every other person to whom any use was thereby limited, to demise the lands for any number of lives or years, con-

sistent with their respective interests therein, in possession, without fine, &c. This did not warrant a lease for three lives, with a covenant to put in a new life on the failure of any of the three, on payment of a fine.

But a power to grant leases for two or more lives implies an authority to grant them during the life of the survivor, although the power is silent in that respect. (Sug. Pow. 744.)

Defects of this nature—*i.e.*, in respect of the duration of the term—will fall within the provisions 12 & 13 Vict. c. 26, and 13 Vict. c. 17.

7. It should in all cases be expressly declared whether the power is intended to allow the grant of leases in reversion or not.

Leases in reversion when authorized.

If the power is to lease for 21 years indefinitely, the lease ought to begin presently, and not *in futuro*. *Leaper v. Wroth*, 6 Rep. 33 a.

It will be otherwise if an intention to allow leases in reversion appears. *Coventry v. Coventry*, Sug. Pow. 753. It appears not to have been decided whether the fact that the land is in lease at the date of the creation of the power is sufficient to show an intention to allow leases in reversion; it seems that it would not (Sug. Pow. 749, 750); but cf. *Blackwood v. Burrowes*, 4 Dru. & War. 441.

A lease in reversion is either a lease of a reversion on the determination of a prior estate, or is a lease *in futuro*. In the latter case, it may either be to commence at a future day, but subject to the determination of a prior estate; or it may be of a reversion to commence on a future day simply, without reference to any prior estate; but, as a general rule, powers to lease in reversion are construed to mean leases to commence from the deter-

What is a lease in reversion.

mination of existing leases, and not leases to commence generally at any future period.

Distinction
between
leases in
reversion
and leases
in futuro.

There is an important distinction between leases of a reversion and leases *in futuro*. A *chattel lease* (i.e., for years) may be granted pending a prior subsisting one, provided it be within the limits of the power, and provided it give no beneficial interest during the continuance of the subsisting lease; but so long as there is a subsisting *freehold lease in esse*, a second freehold lease cannot be granted. The right of granting a second chattel lease was settled in *Read v. Nash*, 1 Leo. 148, and is recognized as law in *Goodtitle v. Funucan*, 2 Doug. 572; but a second freehold lease cannot be granted, because it must be to take effect *in futuro*, and a freehold cannot be conveyed unless it is to take effect *in presenti*. (*Per* Lord Ellenborough, 10 East. 184); and cf. *Jenner v. Morris*, 7 Jur. N. S. 385, 9 W. R. 566.)

Lord Holt says (1 Com. 39): "The expression to lease in reversion has a different signification in the same conveyance, when applied to leases for lives in reversion, from that which it bears when applied to leases for years. For as a lease for lives cannot, strictly speaking, be made to commence *in futuro*, it will in that case be intended of a concurrent lease or a lease of the reversion; that is, of lands then in lease, to commence in possession after the determination of the then existing lease, though it commences in interest presently, and is concurrent with the existent lease."

A power to make leases in reversion as well as in possession does not authorize a lease in possession and another lease in reversion of the same land. The power to make leases in reversion should be confined to such parts of the land as were not then in possession (*ibid.*) *Sed qu.*, for if a lease be granted in possession, and a year after, another be granted (as it is conceived it may), to

commence after the expiration of the former, why may not the two be granted at one and the same time? (Sheppard's Touchstone, 270 n.). The question seems to be still open.

In *Doe d. Sutton v. Harvey*, 1 B. & C. 426, the donee of a power of leasing either in possession or immediately on the determination of leases then subsisting, granted two leases of the same premises, both executed on the same day, but the one dated the 4th May, 1787, *habendum* for 30 years from 1791, when an existing lease expired; the other dated the 4th June, 1787, for 63 years, *habendum* from 1821. A less rent was also reserved on the second lease in consideration of a covenant to rebuild by the tenant. The lease was held bad, but on the ground that it was a bungling contrivance to throw the cost of rebuilding on the remainderman.

If the power is to lease in possession, a lease in reversion cannot be granted, although the property be in lease at the date of the creation of the power. Sug. Pow. 752.

In such a case, a lease *in futuro* is also void; and if it be made to commence only a day after the date of the deed creating it, it is as fatal a variance from the power as if made to take effect at the expiration of 100 years from the time; and the rule is the same in equity as at law (*ibid.* 760). But it seems that a lease for three years, and so from three years to three years, makes but one term of six years. (*Per* Bridgman, C.J., 1 Lev. 46.)

Although all leases, where there is a particular estate out, are leases in reversion, it has been held that where there was a power to grant leases in possession, but not by way of reversion or future interest, a lease *per verba de præsenti* is not contrary to the power, Leases *per verba de præsenti*, when the premises are let to tenants from year to year.

although the estate at the time of granting the lease was held by tenants at will or from year to year, if at the time they received directions from the lessor to pay their rents to the lessee. (*Goodtitle v. Funucan*, 2 Dougl. 565.) The decision rested on three grounds: (1) that the tenants agreed to the lease and surrendered their possession before the execution of it, in order to make it valid. (Lord St. Leonards thinks this the true ground: *Pow.* 762.) (2) That if the jury had not found the defendant to be in possession, still the lease would have been good as a concurrent lease. (3) That all the subsisting leases were leases at will; there was no outstanding lease as against the remainderman: he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately.

Principle governing the construction of doubtful phrases.

In considering particular phrases, the principle laid down by Lord Manners in *Dowling v. Foxall*, 1 B. & B. 196, should be remembered—that the Court will reject that construction in a doubtful case by which a right would be divested or a forfeiture incurred.

Accordingly, a lease to take effect “from henceforth,” or “from the time of delivery,” is a lease in possession, and shall commence from the delivery, when no time is mentioned (*Clayton's Case*, 5 Rep. 1, Co. Litt. 46, b.); so, too, “from the day of the date;” (*Pugh v. Duke of Leeds*, 2 Cowp. 714), although, in general, terms of years last during the whole anniversary of the day from which they are granted. (9 Ad. & E. 894.)

As a deed takes effect from its execution, not from its date, a lease, although according to its date it may be *in futuro*, will be supported if it be shown to have been executed at such a time as to make it take effect in possession. In *Doe d. Cox v. Day*, 10 East, 427, the lease was dated 17th February, 1802, *habendum* from the 25th March then next; but it was not executed until the 27th April. It was held good.

In order to support a lease, a surrender of an old lease has been presumed. *Goodtitle v. Funucan*, 2 Dougl. 565. And (as before stated) equity has relieved against the want of such a surrender. *Campbell v. Leach*, Ambl. 740. Surrender of former lease presumed.

It has been held that where the lessee was himself the former tenant, his acceptance of a new lease operated as a surrender at law of the unexpired residue of his old term; but if the new lease were void, the surrender of the old lease would have been void also; if voidable, the surrender would stand or fall with the old lease. *Doe d. Lord Egmont v. Courtenay*, 11 Q. B. 702; and as to surrenders, see 8 & 9 Vict. c. 106, s. 3.

8. It seems the better opinion that concurrent leases—that is, leases to commence *in præsentia*, but only taking effect in possession after the determination of a subsisting lease—are not leases in possession. Concurrent leases.

In a note to Sheppard's Touchstone, 270, the learned editor says: "Under a power which requires that leases under it should be granted in possession, it is not sufficient, it is conceived, that the term is made to commence *in præsentia* or immediately; but in order to constitute a lease in possession within the true meaning of the power, the lessee should have immediate possession of the property. There are, however, authorities which countenance the opinion that, if the term is made to commence immediately, the lease will be good, notwithstanding there may be a prior lease in existence." In *Goodtitle v. Funucan* (2 Dougl. 565, *ante*, 2nd point), Lord Mansfield said: "For this, *Read v. Nash* (1 Leon. 148), was cited, where under a proviso to grant leases only for 21 years a lease had been granted in 4 Ph. & M. for 21 years, and afterwards (18 Eliz.), a year before the expiration of that lease, another was granted of the same premises for 21 years to begin presently, and it was

held that the second lease was good. The reason given is a strong one — viz., that the inheritance was not charged in the whole with more than 21 years. No authority was cited against this case, nor any answer given against the reasoning in it.” Lord St. Leonards, however, points out that the case was not decided on this point; for after the first lease was granted, a fine was levied, and it was determined that it was a forfeiture by the tenant for life, and therefore the second lease was void. And see his argument against concurrent leases (Pow. 768—777).

Moreover, if the best rent were required to be reserved, and the rent reserved by the concurrent lease is greater than that reserved by the prior lease, this is on the face of it evidence that the rent is not the best; for if the concurrent lessee pays money out of pocket before he comes into possession (as he must do if he pays more than he receives from the lessee in possession), such payment is in the nature of a fine; if he had not had to pay it, he would clearly have given a higher rent.

In Davidson, v. 254, a form is given of a concurrent lease granted under a power which authorized the reservation of an increased rent to commence *in futuro*. It is there said (p. 256), that it admits of considerable doubt whether a reservation of rent of this nature would not invalidate a lease granted in pursuance of the ordinary power requiring the best rent to be reserved, as upon the very face of the lease it would appear that the best rent was not reserved from the commencement of the term; and that where, in the absence of special authority, the concurrent lease reserves an increased rent co-extensive with the term granted, the proper course to adopt appears to be, to reserve the maximum rent in the first instance, and to add a proviso that, during the continuance of the original lease, the excess only should be receivable under the concurrent lease.

Leases in reversion under powers which only allow of leasing in possession would not fall within the scope of 12 & 13 Vict. c. 26, and 13 Vict. c. 17, unless the donee of the power continued in the ownership until he could lawfully grant such lease (s. 4) and the lessee entered; for the statute requires (s. 2) that the lessee should have entered under his lease, which he could not of course do if his lease was merely reversionary.

Effect of statute on reversionary leases.

9. The power usually provides for the reservation of the best rent; but even if it be not expressly required, a lease at an undervalue would probably be void, as not being within the intent of the power.

Reservation of best rent.

There is but one criterion which our Courts always attend to as a leading criterion in discussing the question whether the best rent has been got or not; that is, whether the man who makes the lease has got as much for others as he has for himself. If he has got more for himself than for others, that is decisive evidence against him. *Montgomery v. Wemyss*, 5 Dow, 293, 344.

But the lessor is not bound to accept the person who offers the highest rent. *Doe d. Lawton v. Radcliffe*, 10 East, 278. In that case the Court said that, where the transaction was fair and no fine or other collateral consideration was taken by the tenant for life leasing under the power, or injurious partiality shown by him in favour of the particular lessee, there ought to be something extravagantly wrong in the bargain in order to set it aside on this ground; for in the choice of a tenant there were many things to be regarded besides the mere amount of rent offered. And see *Dyas v. Cruise*, 2 J. & L. 460.

Not necessarily the highest.

Rent is defined by C. B. Gilbert to be an annual return made by the tenant, either in labour, money, or provisions, in retribution for the land that passes.

Definition of rent.

In *Campbell v. Leach*, Ambl. 740, and *Basset v. Basset*, *ibid.* 843, ore was held analogous to money, and a good

reservation of rent; but it may, perhaps, be doubted whether any but a money rent could be safely reserved under the ordinary power at the present day.

Distress by remainderman. Rent reserved on a lease is rent properly speaking, and the remainderman can distrain for it. (Co. Litt. 214, a., citing *Harcourt v. Pole*, 1 And. 273.)

Must be reserved specifically. The best rent must be ascertained and specifically reserved: it is not enough to follow the words of the power and reserve "the best rent." *Orby v. Mohun*, 2 Vern. 531, 542. So, too, if the ancient rent be required, it is not enough to reserve "the ancient rent." (*Ibid.*)

Fines. If a fine is taken, it is clear that the rent cannot be the best rent; for however much it may be, the lessee would have given more if he had not had to pay the fine. And it seems that taking a fine is contrary to a prohibition against diminishing the rental of an estate. *Montgomery v. Wemyss*, 5 Dow, 293.

Surrender of existing lease. And it seems that a lease may well be granted on the surrender of an existing lease, if the latter be at a rack-rent; but if it be a beneficial lease, it is difficult to say that the best rent is obtained, for it must have been diminished to the extent of the value of the surrendered lease; but in such a case equity would give relief. (Sug. Pow. 779.)

Covenants by lessee to lay out money in improvements. It seems, too, that improvements by the tenant or a covenant to lay out money on improvements will not authorize a lease at less than the best rent. *Roe d. Lord Berkeley v. Archbishop of York*, 6 East, 86; but see *Shannon v. Bradstreet*, 1 S. & L. 52, where Lord Redesdale thought this would not be sufficient to avoid the lease if the rent were the best that could be got—*i.e.*, that the covenant to lay out money in improvements did not necessarily show that the rent was less than could have been obtained. As to this, Lord St. Leonards says (Pow. 780), that although the rent reserved be the full value of

the land, yet if satisfactory evidence could be produced to a jury that a tenant was willing to give an additional rent in lieu of the money agreed to be laid out in improvements, the lease could not be supported. It would not be the best rent that could have been obtained. In these cases, it is not necessary that there should be fraud and collusion between the lessee and the tenant for life. The simple question is, Is the rent the best rent? If it be not, the lease must fall to the ground, however fair the transaction. And see *Doe d. Griffiths v. Lloyd*, 3 Esp. 78.

In *Doe d. Bromley v. Bettison*, 12 East, 304, a lease was upheld, although the lessor undertook the repairs of the mansion-house, and covenanted that if he did not repair within three months after notice, the tenant might do so and deduct the expenses from the rent; and although the lessor covenanted, in consideration of a large sum to be laid out by the lessee in repairs, to renew on the same terms. As to the first objection: If the tenant is to keep the premises in repair, the rent is so much less; if the landlord be to repair, the rent is so much greater. It was a question for the jury whether, taking into consideration the repairs to be made by the landlord, the rent was a fair one.

In *Price v. Assheton*, 1 Y. & C. Ex. 82, Lord Lyndhurst said that another question of some nicety arose, namely, whether, although money was to be laid out by the lessee, and the rent to be estimated by the valuers, without reference to the money so to be laid out, that was within the terms of the power? *Primâ facie*, a rent so reserved is not an improved rent; but in that case it was stipulated that the improvements should be made by the tenant, in consideration of the new lease. He also said during the argument, "If it be worth the tenant's while to pay rent and also to make improve-

ments, it shows that the rent taken by the landlord is not the most improved rent." And see *Doe d. Rogers v. Rogers*, 5 B. & Ad. 755.

Rent and
heriot and
condition
for re-
entry.

And a power which required the reservation of a fixed rent and a heriot, and of a condition for re-entry for breach of covenants, was held not well exercised by a lease which reserved a much larger rent but no heriot, and contained no condition for re-entry. *Doe d. Lord Egmont v. Hellings*, 6 Jur. 821, and *Doe d. Lord Egmont v. Grazebrook*, 4 Q. B. 406.

Usual rent.

Although, perhaps, "usual" may in most cases be equivalent to "most" (4 M. & S. 378), it will be otherwise if it be used in contra-distinction to "best" or "most."

In *Doe d. Newnham v. Creed*, 4 M. & S. 371, a testator gave A. a power of leasing lands in Sussex for 21 years at the most rent, and lands in Middlesex for 61 years at the usual or other the most rent. At the testator's death, the property in Middlesex was let at a small rent, a fine having been taken. It was held that A. might demise it at a slightly higher rent, taking a fine. In this case there were two descriptions of property—that which lay in Sussex, for which the testator provided that the most rent should be reserved, as upon an agricultural lease; and that which lay in Middlesex, for which the usual or other the most rent was to be reserved. This was intended to secure the remainderman as much as before, but also to allow the lessor to take a fine; for this had been done before. Importance was also attached to the variation of phrase in the same instrument as to the reservation of rent.

Ancient
rent.

Powers used formerly to require the reservation of the ancient rent: this is now seldom, if ever, done. Where such a term is introduced, the better opinion is that, as a general rule, the rent reserved at the time of the creation of the

power, where a lease was then in being, or the last before it, where no lease was then in being, is the rent to which the power must be taken to refer. (Sug. Pow. 790, and *Doe d. Douglas v. Lock*, 2 A. & E. 705; *Roe d. Brune v. Rawlings*, 7 East, 279; *Doe d. Lord Egremont v. Grazebrook*, 4 Q. B. 406.) In *Doe d. Biddulph v. Hole*, 15 Q. B. 848, it is laid down that, although the latest lease preceding the creation of the power is entitled to greater weight than any single earlier lease, and ought to govern the decision when there is a balance of evidence, yet when the ancient custom appears to have been uniform, and a single lease varying therefrom was granted just before the creation of the power, the exceptional lease ought not to govern merely because it is the latest.

But whatever rent is reserved should be reserved during the continuance of the whole term at an uniform rate. In *Doe d. Sutton v. Harvey*, 1 B. & C. 426, the donee of a power of leasing which required the reservation of the best rent, demised for two terms at one and the same time, the first for 30 years from 1791, the other for 63 years from 1821: the rent reserved on the first lease was 270*l.* per annum, that on the second was 120*l.*, but it contained a covenant to rebuild. The lease was held bad, partly on the ground before mentioned, that a lease in possession and a lease in reversion of the same premises could not be granted at the same time, but chiefly because the best rent was not reserved throughout the term granted by the second lease. And see *Mountjoy's Case*, 5 Rep. 4, s. 6.

Rents should be uniform.

Rent now accrues from day to day, and is apportionable in respect of time accordingly. (33 & 34 Vict. c. 35.) Before that statute it was to the advantage of the remainderman that the rent should be reserved at long intervals, as he thereby had the chance of obtaining the

Yearly
rent.

rent which accrued during a period when the tenant for life had been in possession. It was, however, determined that a yearly rent might be reserved and made payable yearly, half-yearly, or quarterly. It means a rent payable within each year, not merely payable at the end of each year: in every year, as long as the lease endures, a yearly rent is to be reserved and made payable. This was decided in *Rutland v. Wythe*, 10 C. & F. 419, where the Lords concurred in the opinions of the majority of the Judges and upheld a lease for 21 years, from 11th October, 1833, at the yearly rent of 903*l.*, payable by half-yearly payments on the 6th April and 11th October in each year, except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st August next before the determination of the said term. The provision was clearly a reasonable one, and was within the terms of the power. (And see *Doe d. Lord Shrewsbury v. Wilson*, 5 B. & Ald. 363; *Fryer v. Coombs*, 11 A. & E. 403.) Baron Rolfe (p. 432) said that a lease in which each year's rent is reserved on the first day of the year would be within the power, if a jury could find, what they had found in that case, but perhaps could not in the case suggested, that the rent so reserved was the best rent that could be reasonably obtained: such a reservation would be unreasonable; (Sug. Prop. H. of L. 502), and in *Booth v. A'Beckett*, 9 L. T. N. S. 68 (P. C.) where, under a power which required the reservation of the best yearly rent without fine, a lease was granted for 21 years at a yearly rent, but five years' rent was to be paid in advance; the lease was held bad.

Half-yearly
rent.

As a yearly rent must be reserved and made payable in every year of the term, so a half-yearly rent must be reserved and made payable in every half-year in the term: and moreover, it seems that such a rent must be reserved at *equal* half-yearly intervals, or, at all events,

on days which by the custom of the country are treated as half-yearly days of payment. (*Doe v. Morse*, 2 C. & M. 247.) In that case the term commenced on the 4th of January, and the rent was payable on the 1st of May and the 29th of September in each year: this was held bad, on the ground that the inequality of the intervals between the payments might have been injurious to the remaindermen.

And not only may the last half-year's rent be made payable in advance, as in *Rutland v. Wythe*, but a stipulation that the first half-year's rent, which is reserved on fixed days throughout the term, should be paid on the first of such days, is good, although a full half year will not have then elapsed. Payment
in advance.

In *Isherwood v. Oldknow*, 3 M. & S. 382, a yearly rent was required to be reserved; the lease was granted on the 15th of October, and by stipulation of the parties, payment of a half-year's rent became due on the 11th November following: this was upheld. And see *Doe d. Hopkinson v. Ferrand*, 20 L. J. C. P. 202; *Doe v. Wilson*, 5 B. & Ald. 363.

It has been said that the mere joining of strange tenements at an entire rent is fatal to the lease. (*Doe d. Lord Egremont v. Stephens*, 6 Q. B. 208.) This seems not to be correct to its full extent. Lord St. Leonards lays down the following rules (Pow. 810); and see *Doe d. Douglas v. Lock*, 2 A. & E. 705, 747:— Joining
strange
tenements
at entire
rent.

1stly. Where a rent is reserved according to the quantity or produce, as the tenth of the produce of every mine, or 40s. an acre or the like, then although the demise is joint in terms, and part is not well demised, or is not comprised in the power, yet it shall hold good as to the lands within the power and duly demised.

For this he cites *Campbell v. Leach*, Ambl. 740, where opened and unopened mines were demised together, reserving the eighth ten dish dole of the minerals got during the term: the power did not authorize the demise of unopened mines, but the Court held the lease good as to the opened mines.

2ndly. Where the ancient rent is required, and that is reserved as an entire rent for the land within the power and more, the lease is bad as an execution of the power, not simply because it tends to destroy the evidence of the ancient rent, but because upon an apportionment, the ancient rent would not remain for the land anciently let. (Co. Litt. 44, b.)

In *Doe d. Bartlett v. Rendle*, 3 M. & S. 99, the power was to let any of the lands limited by the settlement so as there was reserved the ancient rent: the donee of the power demised lands not previously let, (and therefore held not to be within the power) and lands previously let, at an entire rent, viz., that at which the latter had been anciently let. This was held void; but here no rent at all was reserved for the lands not formerly let: consequently, if there had been an apportionment, the ancient rent would not have been reserved for the lands formerly let. But if the ancient rents be reserved, two parcels of land, previously let apart, may be let together at one rent. (*Doe v. Hole*, 11 Q. B. 688.)

3rdly. Where the best rent is required, and the reservation, although of one entire rent for land partly within the power, and partly not subject to it, would, upon an apportionment, leave sufficient for the settled lands, so as to satisfy the terms of the power, it appears to be still open to maintain that the lease may be supported as a due execution of the power.

A fortiori will this be so, if there be not one entire reservation, but distinct reservations, although in the same deed. It seems, too, that the 12 & 13 Vict. c. 26, and 13 Vict. c. 17, would apply to such cases as the above.

And it has been held that, where the power was to lease any part of the settled lands, reserving the usual and accustomed yearly rents, &c., part of the premises, formerly demised jointly with others at an entire rent, might be let at a rent bearing the same proportion to the old rent that the premises demised by the lease bore to the whole premises formerly demised. (*Doe d. Lord Shrewsbury v. Wilson*, 5 B. & Ald. 363.)

The power usually provides that the rent shall be incident to the immediate reversion; but it is not necessary in order to fulfil this requirement, that the reservation should be expressly to the tenant for life and after his death to the person or persons entitled to the reversion and inheritance of the premises under the instrument creating the power. For the lease has not its essence from the estate of the lessor, but from the instrument out of which the lessor's estate is derived, and in construction of law it precedes the estate for life and all the remainders; for after the lease made, it is as much as if the use had been originally limited to the lessee for a term, and then the other limitations in construction of law follow it. (*Whitlock's Case*, 8 Rep. 71. b.) The reservation, therefore, is the creature of the power, and transferred with the subsequent limitations; it is virtually made by the person out of whose estate the power was first created, and virtually the assignment comes from him; it is not strictly an assignment from the person who signs the lease, but from the person out of whose estate the lease was to have its essence and operation. (3 M. & S. 396.)

Incident to
the rever-
sion.

Thus, when the lessor reserves rent to himself and his heirs, it is good; for that, by construction of law, pre-

Reservation
to lessor
and his
heirs;

cedes the limitations of the uses, and then it being well reserved, it is well transferred to everyone to whom any use is limited. (*Whitlock's Case.*)

To lessor
and every
person to
whom the
reversion
may come.

So if the reservation be to the lessor and to every person to whom the inheritance or reversion of the premises shall appertain during the term, that is likewise good, for the law will distribute it to everyone to whom any limitation of the use shall be made. (*Ibid.*)

But the most clear and sure way is to reserve rent yearly during the term, and leave the law to make the distribution without an express reservation to any person. (*Ibid.*)

In *Greenaway v. Hart*, 14 C. B. 340, lands were limited to such uses as A. should appoint, and in default to the use of B. in trust for A. A. granted a lease by means of his power, reserving rent to himself, his heirs, and assigns; the rent and power of re-entry were held well reserved to the person entitled to the legal remainder expectant on the lease. It is there said:—"If a person seised in fee settles his estate on himself for life with remainders to other persons, reserving a leasing power, which he afterwards exercises, reserving rent to himself, his heirs, and assigns, those in remainder shall have the rent. So also where a person seised in fee, settles his estate on A. for life with remainders over, and gives him a leasing power, which he exercises, reserving rent during the term to himself, his heirs and assigns, the remainderman shall take it, although neither heir nor assign of A.; according to some authorities, because the reservation of rent during the term would give it to him, and that which follows shall not prejudice; according to others, because assigns shall be construed assigns of the party creating the power, out of whose estate the power is supposed to emanate."

In *Rogers v. Humphreys*, 4 A. & E. 299, lands were

limited to the use of two mortgagees for 1000 years, with remainder to A. for life ; with remainder to a trustee for 2000 years, with remainder to such uses as B. should appoint, and in default to B. for life, with remainders over : a power was given to A. to lease for ten years from the date of the deed, or for seven years from her death. A. demised to a lessee for seven years from the date of her death, reserving rent to B. or the person for the time being entitled to the freehold or inheritance of the premises immediately expectant on the death of A. This lease, being made under a power created by the deed of settlement, was to be deemed contemporaneous with the term of 1000 years created by the same deed, and was binding on the mortgagees ; and those mortgagees, although not entitled to the freehold or inheritance, were held to be the reversioners entitled to the rent reserved by the lease, and to distrain for it. And see *Tankerville v. Wingfield*, 3 Eden, 331, n., 2 Brod. & B. 498, n.

On the other hand, in *Yellowly v. Gower*, 11 Ex. 274, the limitations were to the use of trustees for 500 years, and subject thereto to the use of the settlor for life with remainders over, and there was a power reserved to the settlor to lease by deed, either referring or not referring to the power, for twenty-one years in possession and not in reversion, reserving the best rent to be incident to the immediate reversion. The settlor, without referring to his power, but in accordance with it, leased for twelve years, reserving rent to himself, his heirs and assigns. The lease was held bad, one ground being that the rent ought to have been made incident to the immediate reversion, but the lease reserved it to the lessor, his heirs and assigns, and the lessor had no legal estate in possession, and therefore no legal reversion, but simply a legal estate in remainder after the term. If the power had been recited in the lease, that would have shown that it

was meant to be according to the power. (But see *Clere's Case*, 6 Rep. 17, *ante*, p. 146.)

Lord St. Leonards disapproves of this decision; see, too, Davidson, iii. 403, where it is said that in every case of a lease under a legal power to appoint the use, the question whether the lease is a good exercise of the power is in necessary connection with that, whether the rent is incident to the immediate reversion; whenever the lease is an exercise of the power, the rent follows the reversion, and on the other hand, if the rent is not well annexed to the reversion, the reason must be that the lease is abortive and the remainderman not bound.

Right to
re-enter
and to sue
on cove-
nants.

10. The right to re-enter for non-payment of rent or non-performance of covenants, and the right to sue on covenants entered into by the lessee, follow the same rule and pass to the persons entitled to the reversion on the same principles. (*Hotley v. Scot*, 3 Bligh, 331, n.; *Isherwood v. Oldknow*, 3 M. & S. 382.)

But a lessee's covenants are of two kinds, one kind being for the benefit of the lessor and the other reversioners strictly, such as the covenant to pay rent, to repair, &c. : the other being restrictive of the lessee's enjoyment for the benefit of other land of the lessor's not demised to the lessee, such as covenants not to build in a particular manner. It has been said that covenants of this nature are reserved for the benefit of the land not demised : but this is to be taken subject to this qualification, that the right to take advantage of such covenant does not, on every conveyance, of necessity pass with the land, for the benefit of which it was entered into, either at law or in equity, in the absence of all expression of intention in the conveyance. (*Keates v. Lyon*, 4 Ch. 218. *Child v. Douglass*, Kay, 560, the bill in which case was dismissed at the hearing (2 Jur. N. S. 950).) And reference may be here made to the case of *White v. Leeson*,

5 H. & N. 53, where a private act enabled a tenant for life to grant building leases, and to lay out any part of the land authorized to be leased, in streets, &c., "for the general improvement of the estate and the accommodation of the lessees." Part of the premises was laid out accordingly; and a right of way over it was granted to two lessees: it was held that tenants under other leases granted in pursuance of the powers in the Act, but containing no grant by deed of a right to use the way were not entitled to it.

It appears not to be settled, whether the burden of the lessor's covenants will also run with the reversion, so as to bind the remainderman: if they are such as are warranted by the power, it appears the better opinion that they would. (Davidson, iii. 402, n.; Sug. Pow. 834.)

The power usually requires that there shall be a condition of re-entry on non-payment of rent, or non-performance of any of the covenants or conditions contained in the lease.

As to the condition on non-payment of rent, Lord St. Leonards (Pow. 822) says that where the power is silent as to time and conditions, a reasonable time and circumstances may be introduced into the clause of re-entry; and if the power expresses the time, although that prevents further time from being allowed, yet a reasonable qualification may be introduced into the clause of re-entry.

In *Smith v. Lord Jersey*, 3 Bligh, 290, the power was silent as to time and conditions, and it was held that a lease for lives was well granted, which contained a power of re-entry *if the rent should be behind for 15 days and no sufficient distress could be had on the premises*.

In *Doe d. Lord Shrewsbury v. Wilson*, 5 B. & Ald. 363, the power required that leases made under it should contain a condition of re-entry for non-payment of rent: the lease reserved rent payable on fixed days, and provided

Distress
after de-
mand only.

that if the rent should not be paid on those days, the lessor might enter and distrain, and the distress take away and keep until the rent should be satisfied; and also, that if the rent should be unpaid for 28 days after it became due, being lawfully demanded, the lessor might re-enter. The third of five objections taken to the lease was that the landlord could only distrain by the terms of the lease after demand, and was bound to detain the distress until satisfied. The objection was overruled on the ground that the landlord had a power to distrain and to sell the distress independently of the clause: and that the true construction of the clause was, that it was introduced in furtherance, and not in lieu, of the common law and statutory power.

Re-entry
postponed
for 28 days
and after
demand.

The fourth objection was twofold: viz., that the right of re-entry was postponed for 28 days: and only arose after the rent had been lawfully demanded. The period of 28 days was considered reasonable, especially as the same term was contained in a prior lease of the same premises. (And see *Doe v. Rutland*, 2 M. & W. 661, where the period was 42 days.) And it was held that the provision as to demanding the rent did not deprive the landlord of the benefit of 4 Geo. 2, c. 28, which relieves the landlord from the necessity of making the demand: but Abbott, C. J., thought that it might be otherwise if the lessor expressly covenanted not to re-enter without demand.

Where
power
specifies a
period.

In *Hotley v. Scot*, sub. nom. *Tankerville v. Wingfield*, 3 Bing. 331, n., the power required the insertion of a clause of re-entry, if the rent should be behind for 21 days. The condition in the lease was, if the rent should be behind and unpaid for 21 days, and no sufficient distress could be had. (3 Bing. 334, per Best, J.) Lord Mansfield held this provision as to the distress to be good: saying, "the clause of re-entry [in

the power] is short, with words of course, and does not preclude the operation of law. A re-entry is to enforce the payment of rent: it is an immediate forfeiture of the estate by common law. By statute it cannot be without a want of distress." As to this, see 4 Geo. 2, c. 28, which provides for the re-entry of landlords in certain events, one being that it be shown that no sufficient distress was to be found on the demised premises countervailing the arrears then due. But see *Coxe v. Day*, 13 East, 118, which however Lord St. Leonards (Pow. 822) considers overruled by *Smith v. Lord Jersey*, 3 Bl. 290.

A lease containing a condition of re-entry on the rent being 20 days in arrear, when the power mentions 21, is not bad; for it is more beneficial to the remainderman. *Doe d. Douglas v. Lock*, 2 A. & E. 705.

Nor will a clause restricting re-entry to the case of there being no distress be bad, although the power may specify "no overt distress." The word overt has no legal meaning as attached to a distress. (*Ibid.* 742.)

Overt
distress.

It has been held, however, that, where a power required a condition of re-entry for non-payment of rent and non-performance of covenants, a lease with a covenant to repair, and a proviso for re-entry, if the tenant should suffer the premises to be out of repair and should not repair within six months after notice, is bad. *Doe d. Lord Egremont v. Burroughs*, 6 Q. B. 229.

Re-entry
for breach
of cove-
nants.

11. If a power require leases to contain the usual reservations, &c., the distinction between exceptions and reservations must be remembered. "Note a diversity between an exception, which is ever of part of the thing granted and of a thing *in esse*, for which, *exceptis, salvo, præter*, and the like, be apt words: and a reservation, which is always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised." Co. Litt. 47, a.

Reserva-
tions.

A privilege of hawking, hunting, fishing, or fowling is not either a reservation or an exception in point of law. (*Doe d. Douglas v. Lock*, 2 A. & E. 705, 743.)

Words of this sort are to be read in their proper legal sense, unless the creator of the power has imposed a different meaning upon them, which is apparent on the face of the instrument, in which case his sense must be adopted: if the words are unexplained and there is sufficient to satisfy them in their legal sense, they must be confined to that meaning. (Sug. Pow. 818.)

Counter-
part.

If the execution of a counterpart be required, the lessee should obtain a memorandum of its execution and delivery to be endorsed on the lease and signed by the lessor: the counterpart need not be contemporaneous with the lease (*Fryer v. Coombs*, 11 A. & E. 403), but must be executed within a period which may fairly be considered as comprehended in the transaction. (Sug. Pow. 827.)

Waste.

12. Powers sometimes require that the lessee should not be made dispunishable for waste. Mr. Davidson (iii. 411, n.) says that under a power in a deed or will to grant leases for twenty-one years at the best rent (saying nothing about waste), it could not probably be doubted that a lease without impeachment of waste would be unauthorized and void, and consequently the insertion of an express clause for the mere purpose of prohibiting such leases would be superfluous; and he considers it the more eligible and prudent course to omit such a clause in leasing powers (p. 415): the only object in inserting such a clause seems to be to render any attempt to grant a lease without such restriction void on its face (Chance, Pow. 2360): but the existence of such a clause has been said to afford a strong argument for holding that a power to lease lands did not authorize a lease of unopened mines. (*Clegg v. Rowland*, 2 Eq. 166.)

No act can amount to waste unless it be injurious to

the inheritance, either, first, by diminishing the value of the estate ; or, secondly, by increasing the burdens upon it ; or, thirdly, by impairing the evidence of title. (*Doe d. Grubb v. Lord Burlington*, 5 B. & Ad. 507. As to waste generally, see *Bowles' Case*, Tudor L. C. Conv. 29.)

Mr. Chance (Pow. 2360) says, that in ordinary cases the clause as to waste can scarcely mean, it seems, that the tenant must undertake the repairs. There is, however, some conflict of authority as to this.

Must the
tenant
repair ?

In *Doe d. Bromley v. Bettison*, 12 East, 305, the instrument creating the power forbade the insertion of any clause giving authority to the lessee to *commit* waste, or exempting him from punishment for *committing* waste. By the lease granted under the power, the lessor undertook to repair the mansion-house (except windows) and covenanted that, if the roof required repair and he did not repair, the tenant might do so and deduct the charge out of the rent. It was contended that this amounted in fact to an exemption of the lessee from liability for permissive waste : but the Court held the lease good. The question was really as to the quantum or sufficiency of the rent reserved. If the tenant were to keep the premises in repair, the rent would be so much less : if the landlord, so much greater.

In *Nugent v. Cuthbert*, Sug. Prop. H. of L. 475, the settlement creating the power required that the lessees should not be made punishable for waste by any express words. The Lords held a lease good, which contained a covenant by the lessee to repair, casualties by fire and war excepted. On the other hand, in *Yellowly v. Gower*, 11 Ex. 274, the power directed that the lessee should not be made punishable for waste or exempted from punishment for committing waste ; the lessees covenanted to keep part of the demised premises in repair on being found materials, and the lessor covenanted to

keep the rest of the premises in repair. The Court held the lease bad; for the lessor's covenant to repair amounted to an implied permission to the lessee not to repair. The case was distinguished from *Doe d. Bromley v. Bettison*, on the ground that in that case the power prohibited any clause giving power to *commit* waste or exempting from punishment for *committing* waste, but did not forbid permissive waste: in the case before the Court, the term "dispunishable for waste" included both permissive and commissive waste, and was not restrained by the subsequent part of the sentence. Mr. Davidson (iii. 414) considers that "this decision proceeded on a narrow view of the clause as to waste, and though not exactly at variance with the existing authorities, was by no means required by them." It seems, however, that it is contrary to the first principle laid down in *Doe d. Grubb v. Lord Burlington (suprà)* that there can be no waste, unless the value of the estate is diminished: and to the reasoning on which the judgment in *Doe d. Bromley v. Bettison* proceeded, viz., that it was in reality a question of the quantum of the rent.

No waste if the act be within the terms of the power.

But no act which is within the terms of the power can be punishable as waste. In *Morris v. Rhydydefed Colliery Company*, 3 H. & N. 473, 885, a settlement contained a power for tenant for life to lease the premises for lives to any persons willing to build thereon: also a power to lease for sixty-three years the coal mines under the lands, "with all such powers, authorities, accommodations, liberties and privileges as shall be necessary, or are usually contained in leases of collieries or mines, &c., so as the lessees be not made dispunishable for waste by any express words." In execution of the power, a lease was granted which empowered the lessee to build such erections, cottages, &c., as should be necessary or proper for the due pro-

secution of the works : it also empowered the lessee to dig and use stone, &c., which should be required for the collieries or any buildings thereby authorized. The jury found that a power to build cottages was necessary and usual. The Court held—(i.) that the lease was not in excess of the power ; (ii.) that the lease was not void on the ground that the power to build and to dig and use stone, &c., was in violation of the provision that the lessees should not be made punishable for waste.

So, if a power authorize leases of unopened as well as of open mines, the clause that the lessees shall not be made punishable for waste will in a mining lease be rejected as repugnant and void. (*Clegg v. Rowland*, 2 Eq. 166 ; *Daly v. Beckett*, 24 B. 114.)

The clause would also, it seems, be void if the power authorized building leases ; and the lessee might pull down old houses in order to erect new ones. (*Jones d. Cowper v. Verney*, Willes, 169.)

In *Doe d. Lord Egremont v. Stephens*, 6 Q. B. 208, where the power provided that the lessee should not be authorized to commit waste, and the lease contained a stipulation that the lessee should build a new dwelling-house, and might pull down an outhouse and use the materials for so doing, the lease was upheld. And see *Doe d. Hopkinson v. Ferrand*, 20 L. J. C. P. 202.

Acts which do not amount to waste.

13. The power often requires that the usual, or the usual and reasonable, covenants should be contained in the lease. Even if the power made no such requirement, it seems that a lease containing no covenants by the lessee could not be upheld ; for, as a mere agreement for a lease means a lease containing the usual covenants (*Church v. Browne*, 15 Ves. 265), so a power to grant leases without more might well be said to mean leases containing the usual covenants ; and it would moreover probably be a fraud on the power. (Sug. Pow. 827.)

Usual covenants.

If the power authorize ordinary leases at rack-rentals, it seems that the "usual covenants" will be those which are usual as between lessor and lessee; but if the power authorizes beneficial leases, the words "usual" or "usual and reasonable" will be construed with reference to their bearing on the relative rights of the tenant for life and remainderman, and the lease in existence at the time of the creation of the power will be taken as the guide. (Davidson, iii. 407, n.)

The following have been held to be usual covenants by the lessee in an ordinary lease; to pay rent (*Taylor v. Horde*, 1 Burr. 125); to pay taxes, except such as are expressly payable by lessor; to keep premises in repair (*Doe d. Dymoke v. Withers*, 2 B. & Ad. 903); to allow the lessor to enter and view state of repairs (1 Ha. 181); and by the lessor, for quiet enjoyment (*Hale v. City of London Brewery*, 31 L. J. Q. B. 257, and see Davidson, v. 47—49, where the cases are collected). Under a power to lease for 21 years with the usual covenants, a covenant by the lessor that "in case of fire, the lessor shall rebuild or the lessee may quit," is not usual (*Doe v. Sandham*, 1 T. R. 705), nor would equity aid the lessee by reforming the lease (*Sandham v. Medwin*, 3 Sw. 685); but see now 12 & 13 Vict. c. 26.

Where the power authorizes leases at the ancient rents, &c., so that every lease shall contain the usual and reasonable covenants, the lease in existence at the time of the creation of the power is usually to be taken as the guide. *Doe d. Douglas v. Lock*, 2 A. & E. 705; *Doe d. Lord Egremont v. Williams*, 11 Q. B. 688, *ante*, p. 494.

A lease, if it be not within 12 & 13 Vict. c. 26 and 13 Vict. c. 17, will be invalidated, therefore, not merely by the omission of a proper, but also by the insertion of an improper covenant, and equity will give no aid; but a mere personal covenant by the tenant for life binding

himself only may not avoid the lease. (*Doe d. Bromley v. Bettison*, 12 East, 305.)

14. A power to grant building leases will not, it seems, authorize a mere repairing lease without any obligation to build. In *Jones d. Cowper v. Verney*, Willes, 169, a power was given by Act of Parliament to grant building leases, such leases to contain the usual and reasonable covenants; it was held not well executed by a lease which contained a covenant to keep in repair the premises demised, or such other house as should be built during the term: the act was held [to intend building leases, not leases only for the encouragement of rebuilding; and the Court said that a reasonable covenant in a building lease must certainly be a covenant to build; and it made no difference that the lessee had actually built two houses. Building leases.]

In *Higgins v. Rosse*, 3 Bligh, 112, where the power was to lease six acres at the best rent, with covenants to build, specific performance of a covenant to renew a lease granted under the power, but which contained no covenant to build, was refused (*semble*) on the ground that the lease was not warranted by the power.

15. A repairing lease, in common parlance, means a lease by which the lessee is bound to lay out money in repairing the premises. Repairing lease.

Where a lessée covenants well and sufficiently to repair, uphold, support, maintain, amend, and keep, not only the demised premises, but all buildings thereon erected, and to deliver them up well and sufficiently repaired, upheld, supported, amended, and kept together, this is enough to make a lease a good repairing lease (*Easton v. Pratt*, 2 H. & C. 676), for a covenant to *keep* in repair binds the tenant to *put* in repair (*Payne v. Haine*, 16 M. & W. 541); but see *Doe d. Dymoke v. Withers*, 2 B. & Ad. 896, where it was held that a power to lease "for the purpose of new building or effectually rebuilding and repairing" was not

well executed by a lease which contained a covenant to repair only, such covenant not being equivalent to a covenant to rebuild and repair; and see Lord St. Leonards' remarks on this case (Pow. 830.)

Who is
entitled to
damages
recovered
on breach
of cove-
nants.

Damages, as a general rule, are the personal estate of the person who recovers them; but there appears to be a distinction between ordinary covenants, such as to repair and the like, and special covenants to rebuild, &c. In a case where lands (then in lease) were devised to A. for life, with remainders over, it was held that damages, recovered by the tenant for life in respect of breaches of covenants contained in the lease, belonged to such tenant for life absolutely (*Noble v. Cass*, 2 Sim. 343). The remaindermen could of course also recover on the covenants, if the lease was subsisting when the estate came to them. In *Shannon v. Bradstreet*, 1 S. & L. at p. 73, Lord Redesdale, speaking of a covenant to lay out 200*l.* in improvements, says:—"If it were colourable and merely for the purpose of putting money into the pocket of the tenant for life, it would avoid the lease; or if it were not originally intended as a fraud, but were afterwards used fraudulently (as, for example, a covenant to repair, and a sum of money under colour of damages for breach of that covenant recovered by the tenant for life) a court of equity would at least take care that the damages should be laid out on the lands." But this might be solely on the ground of the fraud. If, however, a building lease were granted under a power which required that the tenant should covenant to lay out a sum in building, it would seem contrary to the nature of the power to allow the tenant for life to recover and keep for his own benefit damages for the breach of such a covenant.

Statutory
powers of
leasing, 19
& 20 Vict.
c. 120.

16. By 19 & 20 Vict. c. 120, s. 2, the Court of Chancery is empowered to authorize leases of settled estates, subject as follows:—

(1.) Every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease 21 years; for a mining lease, or a lease of water, water mills, wayleaves, waterleaves, or other rights or easements, 40 years; and for a building lease 99 years, or where the Court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant building leases for longer terms, then for such term as the Court shall direct.

The term "building lease" includes a "repairing lease," so that no repairing lease be made for a term exceeding 60 years. 21 & 22 Vict. c. 77, 2. The power to enlarge the term on the building leases is extended to all leases except agricultural leases. *Ibid.* s. 4.

(2.) On every such lease shall be reserved the best rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener, without taking any fine or benefit in the nature of a fine.

(3.) Where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned: namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who, by reason of his estate, or by virtue of any declaration in the settlement, is entitled to work such earth, coal, stone, or mineral for his own benefit, one-fourth part of such rent, and otherwise three-fourth parts thereof: and in every such lease sufficient provision shall be made to ensure such application of the appointed portion of the rent by the appointment of trustees or otherwise as the Court shall deem expedient.

(4.) No such lease shall authorize the felling of any trees, except so far as shall be necessary for the purpose

of clearing the ground for any buildings, excavations, or other works authorized by the lease.

(5.) Every such lease shall be by deed, and the lessee shall execute a counterpart thereof: and every such lease shall contain a condition for re-entry on non-payment of the rent for a period not less than 28 days after it becomes due. The execution of the lease by the lessor is sufficient evidence that a counterpart has been duly exercised. S. 34.

Sect. 3 provides that leases may contain special covenants. Sect. 4 provides that the whole or any part of the settled estates may be leased, and at one time or from time to time.

By sect. 5 leases granted under the Act, and by 21 & 22 Vict. c. 77, s. 5, all leases, whether granted under the Act or not, may be surrendered and renewed. This may be done although an underlease made by the surrendering lessee is outstanding. *Re Ford*, 8 Eq. 309.

By sect. 6 preliminary contracts are authorized, and such contracts may be varied. By sect. 7, the Court may either approve of particular leases, or order powers of leasing in conformity with the provisions of the Act, to be vested in trustees. Sect. 8 provides what evidence is to be produced on an application to the Court. Sect. 9 provides that the Court shall direct who is to execute the lease as lessor: and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or inheritance which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate if necessary by way of revocation and appointment of the use, or otherwise as the Court shall direct.

By sect. 10 powers of leasing may be vested either in

the trustees of the settlement or in any other persons, and such power is to be taken as if vested in them originally by the settlement; and the Court may impose conditions as to consents or otherwise on the execution of the power, and may provide for the appointment of new trustees to exercise the leasing power.

It was formerly made a condition that leases should be settled by the judge: but it is now provided by 27 & 28 Vict. c. 45, s. 4, that such condition shall not be inserted except by desire or for some special reason.

By sect. 2, in all cases of orders already made in which such conditions have been inserted, any party interested may apply to have it struck out; and see *re Russell*, W. N. 1874, 40.

These powers are extended so as to include powers to lords of settled manors to give licences to their copyhold or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be authorized or granted of freehold hereditaments under the Act. 21 & 22 Vict. c. 77, s. 3.

These provisions extend to all settlements, whether made before or after the Act. S. 44.

Sect. 32 provides that it shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates, for an estate for life, or for a term of years determinable with his life, or for any greater estate either in his own right, or in the right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise, and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, without any application to the Court, to demise the same or any part

Leases by
tenant for
life.

thereof, except the principal mansion-house and demesnes thereof and other lands usually occupied therewith, from time to time, for any term not exceeding 21 years, to take effect in possession, provided that every such demise shall be made by deed, and the best rent that can be reasonably obtained be thereby reserved without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment for a period not less than 28 days of the rent thereby reserved, and on non-observance of any of the covenants or conditions therein contained: and provided a counterpart of every deed of lease be executed by the lessee.

This provision extends only to settlements made after the Act. S. 44.

Sect. 33 makes all leases granted under sect. 32 valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement, if the estates be settled, and in the case of unsettled estates against all persons claiming through or under the wife or husband, as the case may be, of the person granting the same, and (21 & 22 Vict. c. 77, s. 8) also against the wife of any husband making such demise of estates to which he is entitled in right of such wife.

Sect. 41. Tenants for life, &c., may exercise the powers conferred by the Act notwithstanding (but subject to) incumbrances.

For the practice under the Act see Morgan's Ch. Acts and Orders, and Daniel's Ch. Pr. 1832.

Lunatics.

17. By 16 & 17 Vict. c. 70, s. 133, where a lunatic has a limited estate only in land and any power whatsoever

of leasing the same is vested in him, the committee of his estate may and shall from time to time in the name and on behalf of the lunatic, under order of the Lord Chancellor, execute the power to such extent and in such manner as the order shall direct: and all fines, premiums, and sums of money are to be laid out as provided in s. 135. See too 19 & 20 Vict. s. 36.

CHAPTER XVIII.

POWERS OF APPOINTING NEW TRUSTEES.

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Persons by whom the power is to be exercised.

1. POWERS of appointing new trustees in settlements are usually made exerciseable by the husband and wife and the survivor of them, and after the death of the survivor by the surviving or continuing trustees or trustee for the time being, or the executors or administrators of the last surviving or continuing trustee; in wills, by the same persons, omitting the husband and wife.

“Survivor.”

In *Cafe v. Bent*, 5 Ha. 24, the power was given to the survivor of A., B., and C. A. disclaimed and B. died; it was held that C. (though not the survivor of A., B., and C.) could well appoint new trustees, on the ground that the power was annexed to the office, although the original donees were named. (And see *ante*, p. 372, and *Adams v. Taunton*, 5 Madd. 435.) And it seems that the term “surviving trustee” is construed with reference to the trust, not to the lives of the trustees who have disclaimed or retired, “survivor” being in effect equivalent to “continuing to act.” *Sharp v. Sharp*, 2 B. & Ald. 405.

“Surviving or

In *Stones v. Rowton*, 17 B. 308, it was held that a

power exerciseable by the surviving or continuing trustees or trustee could not be validly exercised by an appointment by the two trustees (both of whom simultaneously retired) of two new trustees in their places. The Master of the Rolls said that in order to uphold such an appointment, it would be necessary to read "continuing" as synonymous with "retiring;" and two deeds were necessary to make an effectual execution. And see *Nicholson v. Smith*, 26 L. J. Ch. 312; *Travis v. Illingworth*, 2 Dr. & Sm. 344.

In *Camoy's v. Best*, 19 B. 414, the power was given "to the surviving or continuing or other trustees or trustee," and was well exercised by an appointment by a sole surviving trustee, who desired to be discharged, in place of himself and his deceased co-trustees.

The ordinary power of appointing new trustees in a will may be exercised in the event of the death of a trustee before the testator. *Re Hadley*, 5 De G. & Sm. 67; *Noble v. Meymott*, 14 B. 477, overruling *Winter v. Rudge*, 15 Sim. 596; and see 23 & 24 Vict. c. 145, s. 27.

The executors and administrators of the last surviving or continuing trustee must be taken to mean the acting executors and administrators. *Granville v. MacNeile*, 7 Ha. 156.

2. The power is usually made exerciseable in the event of any one or more of the trustees dying or being abroad, or desiring to be discharged, or refusing or becoming incapable to act.

Residence abroad means permanent residence. In *Re Moravian Society*, 26 B. 101, trustees were to be disqualified "on departing the United Kingdom, from whatever cause or motive, or under whatsoever circumstances:" it was held that a temporary absence was not within the provisions.

Declining. A trustee who objected to act with a new trustee, and paid the money into Court, was held to have thereby retired. *Re Williams*, 4 K. & J. 87.

It seems the better opinion that the word "declining" is to be taken in as large a sense as the word "dying," and does not extend merely to the case of a trustee who has never acted. (*Travis v. Illingworth*, 2 Dr. & Sm. 344; but see *Re Armstrong*, 5 W. R. 448; *Re Woodgate*, *ibid.*) And there seems no doubt that refusing to act is equivalent to desiring to retire. Lewin on Trusts, 3rd ed. 571.

Becoming
incapable.

Each case must depend on its own circumstances, but, as a general rule, incapacity means personal incapacity (*Re Bignold*, 7 Ch. 223), consequently residence abroad does not constitute incapacity to act. *Whittington v. Whittington*, 16 Sim. 104; *Re Harrison*, 22 L. J. Ch. 69; *O'Reilly v. Alderson*, 8 Ha. 101, and *contra*, *Mennard v. Welford*, 1 Sm. & G. 426.

But the Court has power, under the 32nd section of the Trustee Act, 1850, to appoint a new trustee in place of a trustee who is permanently residing abroad, without his consent and without serving him. *Re Bignold*, 7 Ch. 223. And in *Re Renshaw*, 4 Ch. 783, a new trustee was appointed by the Court in the place of one who had been adjudicated bankrupt three years before the petition, and had never surrendered or been since heard of. But it seems that the Court will not go into any question of the trustee's conduct on a petition under the Trustee Act, if he refuses to retire. *Re Blanchard*, 3 D. F. & J. 131.

Bank-
ruptcy.

Bankruptcy or outlawry does not render a man "incapable" to act (*Re Watts*, 9 Ha. 106), but it renders him "unfit." (*Re Roche*, 2 Dr. & War. 287.)

A bankrupt trustee may be removed under the general jurisdiction of the Court. (*Bainbridge v. Blair*, 1 B. 495;

Harris v. Harris, 29 B. 107.) He might also have been removed by the Court of Chancery, under s. 130 of the Bankruptcy Act of 1849, if the Court thought fit. (*Re Bridgman*, 1 Dr. & Sm. 104.) And by the Act of 1869, s. 117, it is provided that where a bankrupt is a trustee within the Trustee Act, 1850, the 32nd section of that Act shall have effect so as to authorize the Court to appoint a new trustee in substitution for the bankrupt (whether voluntarily resigning or not) if it appears to the Court expedient to do so, and all provisions of that Act and of any other Act relative thereto shall have effect accordingly. The Court in this section means the Court of Chancery. (*Coombes v. Brookes*, 12 Eq. 61.)

Lunacy, or unsoundness of mind, renders a trustee incapable to act. In *Re East*, 8 Ch. 735, it was provided that if any trustees or trustee should die or become unwilling or incapable to act, the trustees or trustee for the time being, whether continuing or declining to act, might appoint new trustees. One of the trustees became of unsound mind, but was not so found by inquisition, and the other two trustees appointed a new trustee in his place. This appointment was held good. And see the Trustee Act, 1850, s. 3, and 1852, s. 10: and as to the practice under these acts, Daniel's Ch. Pr. 5th ed. 1833; *Re Owen*, 4 Ch. 782; *Re Burton*, Ir. R. 6 Eq. 270.

If the difficulty arises from the lunacy of the donee of the power, his committee may appoint. 16 & 17 Vict. c. 70, ss. 136, 137. And if he does not choose to appoint, or to apply to the Court, the Court of Chancery has jurisdiction to appoint new trustees. (*Re Sparrow*, 5 Ch. 662.) And new trustees appointed by the committee have all the same rights and powers as if they had been appointed under the Trustee Act or in a suit (s. 138).

3. If the power clearly require that only one person

Augment.

ing the
number of
trustees.

shall be substituted in the place of another, it must of course be complied with. But under a power in the common form, or general in its terms, it seems both upon principle and authority, that more than one person may be appointed to fill a vacancy caused by the death, &c., of one of the old trustees. (Sug. R. P. Stat. 413.) In *ex parte Davis*, 2 Y. & C. C. 468, an appointment of four trustees in the room of three was considered invalid. But in *Sands v. Nugee*, 8 Sim. 130, where a trustee was authorized to name any other person to succeed him and he appointed three, their appointment was upheld. And see *Meinertzhagen v. Davis*, 1 Coll. 335.

Under Lord Cranworth's Act, an appointment of two trustees in the place of one has been held valid. *Re Breary*, W. N. 1873, 48. And two trustees of real estate have also been appointed in the place of one under the Trustee Act, 1850. (*Re Tunstall*, 4 De G. & Sm. 421.) And the Court is averse to allowing trust funds to stand in the name of a sole trustee. *Grant v. Grant*, 34 L. J. Ch. 641. In *Re Brakenbury*, 10 Eq. 45, a legacy was bequeathed to A. in trust for a tenant for life and then for reversioners absolutely. On a petition by the reversioners, who were also executors, the Court appointed an additional trustee, but the petitioners were ordered to pay the costs. And the Court has inherent jurisdiction in a cause to appoint new trustees of a will in a case where no trustees were originally appointed by the testator. (*Dodkin v. Brunt*, 6 Eq. 580; and see Sug. R. P. Stat. 415; and *Re Smurthwaite*, 11 Eq. 251; *Re Davis*, 12 Eq. 214, where the appointments were made under the Trustee Act.)

Diminish-
ing the
number of
trustees.

4. Although the appointment of a diminished number of trustees appears not to be *ipso facto* void (*Miller v. Priddon*, 1 D. M. & G. 335; *Re Tagg*, 19 L. J. Ch. 175; *Re Bathurst*, 2 Sm. & G. 169) the Court will not, without

good reason, allow the number of trustees to be diminished, unless the terms of the power authorize it (*Re Ellison*, 2 Jur. N. S. 62). And the Court itself will not appoint a sole trustee, even in cases where no more than one was originally appointed. (*D'Adhemar v. Bertrand*, 35 B. 19.) And in *Lonsdale v. Beckett*, 4 De G. & Sm. 73, where three trustees of a will were appointed, and one died in the testator's lifetime, an appointment by the survivor of the other two of a single new trustee in his own place was held invalid, and the Court would not appoint two trustees only without being satisfied that such a course was for the benefit of the *cestuis que trust*.

It will be otherwise if the terms of the power authorize the number of trustees to be increased or diminished; the trustees may exercise such discretion when they are expressly empowered. And in *Re Stokes*, 13 Eq. 333, where a testator availed himself of the statutory power, but declared that on any appointment the number of trustees might be augmented or diminished, the Master of the Rolls appointed the continuing trustees to be trustees in the place of themselves, and a trustee who wished to retire.

5. Where there is a settlement of English property with English trustees, it would be an imprudent and improper exercise of the power to appoint foreigners, or even to appoint persons habitually resident out of England. But where an English woman married an American and the settlement contained a power to invest in American securities, or on real securities in England or America, and the husband and wife went to reside permanently in America, an appointment of three American trustees in the place of the original English trustees was held good. *Meinertzhagen v. Davis*, 1 Coll. 335.

Who may
be ap-
pointed.

But the Court has refused to authorize the appointment of three foreigners resident in Paris as trustees of a

settlement which allowed investments to be made on Government or real securities in France or England. (*Re Guibert*, 16 Jur. 852.)

The principles upon which the Court acts in appointing new trustees are stated in *Re Tempest*, 1 Ch. 485. As a general rule, the Court will not appoint a tenant for life of real estate, but it may do so, and sometimes has done so. (*Forster v. Abraham*, 17 Eq. 351.)

And as to the responsibility of trustees who retire under circumstances that warrant a reasonable belief of the insecurity of the trust funds in the hands of the new trustees; see *Webster v. Le Hunt*, 8 Jur. N. S. 345; *Palairiet v. Carew*, 32 B. 568; *Sugden v. Crosband*, 3 Sm. & G. 192. And as to appointments of new trustees by the Court of Chancery, see 13 & 14 Vict. c. 60. Morgan's Ch. Acts and Orders, 76.

Trustees
appointed
by the
Court.

6. Before Lord Cranworth's Act, trustees appointed by the Court could not exercise powers operating under the Statute of Uses (*Newman v. Warner*, 1 Sim. N. S. 457), nor powers of appointing new trustees (except in cases of charities, *Re 52 Geo. 3*, c. 101, 12 Sim. 262), for although the Court could appoint new trustees, it could not delegate its powers to its appointees. (*Holder v. Durbin*, 11 B. 594, Sug. R. P. Stat. 416.) But in other respects it seems the better opinion that powers which may be exercised by the Court may be exercised by trustees appointed by the Court. Where the discretion of trustees is to be exercised upon matters of opinion or judgment as to which well-intentioned persons may differ, the Court cannot exercise such discretion; but it will be otherwise if the discretion is to be exercised upon matters of fact. (*Walker v. Walker*, 5 Madd. 424; *Re Phené*, 5 Eq. 346; *Fordyce v. Brydges*, 2 Ph. 497; *Re Coe*, 4 K. & J. 199.)

7. The legislature has now provided for the appointment of new trustees of all instruments and for the

exercise by all trustees, whether appointed by the Court or otherwise, of all the powers contained in the instrument of settlement.

7. By Lord Cranworth's Act, it is enacted, that
"Whenever any trustee, either original or substituted,
and whether appointed by the Court of Chancery or otherwise, shall die or desire to be discharged from, or refuse, or become unfit or incapable to act in the trusts or powers in him reposed before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator of the last surviving and continuing trustee, or for the last retiring trustee by writing, to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or desiring to be discharged or refusing or becoming unfit or incapable to act as aforesaid; and so often as any trustee or trustees shall be so appointed as aforesaid, all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors, or administrators of any trustee, shall with all convenient speed be conveyed, assigned, and transferred, so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require; and every new trustee or trustees to be appointed as aforesaid, as well before as after such conveyance or assignment as aforesaid, and also every trustee appointed by the Court of Chancery either before or after the passing of this Act shall have the same powers, authorities, and discre-

23 & 24
Vict. c.
145, ss.
27, 28.

tions, and shall in all respects act as if he had been originally nominated a trustee by the deed, will, or other instrument creating the trust."

- s. 28. "The power of appointing new trustees thereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator."

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